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In Memoriam

Herbert Felix Jolowicz: 1890-1954

The paper with the thoughtful title, " The Stone that the Builders Rejected," which is printed elsewhere in this volume, was one of the last addresses Herbert F. Jolowicz delivered. He was then on a visit to the United States, where he had come in the fall of 1953 upon the invitation of Tulane University to give a course of lectures in New Orleans. He also spoke at other universities, Yale and Columbia among them; and to the members of the Riccobono Seminar it was a matter of particular delight and honor that he had come to address them on January 4, 1954, a few days before sailing back to England. Some weeks later he delivered the presidential address at the Bentham Club in London, on " The Civil Law in Louisiana," a paper seemingly effortless in form, as was his wont, yet full of incisive observations. The reprints of this speech he sent, a parting gift as it were, to his American friends. It was to be a parting gift forever. The first attack of a circulatory disease, in late spring, was followed by a hopeful recovery in summer; he resumed work on a new book which had occupied him during the last years, and he set out to give the final polish to his Washington paper. A sudden recurrence of his ill-

ness brought about the end within a few days, on December 19, 1954, in his sixty-fifth year.

Herbert Felix Jolowicz was born in London on July 16, 1890. Educated at St. Paul's School, London, and at Trinity College, Cambridge, he graduated with honors in classics (1911) and in law (1913). His post-graduate studies brought him in contact with the great Romanists of the day in Germany, where he attended courses in Leipzig and in Freiburg. During the first World War, Jolowicz served as an officer with the British Army in Gallipoli, in Egypt, and in France. In 1919 he was called to the Bar at the Inner Temple, and in the following year he began his academic career as the All Souls Reader in Roman Law at Oxford (1920-1931). To this was added the Lecturership in Roman Law and Jurisprudence at University College, London (1924), and from 1931 to 1948 he held the professorial chair of Roman Law at London University, serving as Dean of the Faculty of Law in 1937-38. In the second year of his professorship he published the work for which he will be remembered by many a generation, the *Historical Introduction to the Study of Roman Law* (Cambridge University Press, 1932). At the outbreak of World War II, Jolowicz, in his fiftieth year, once more gave his services to his country, this time in the Intelligence Corps (1939-1945). In 1948 he succeeded Francis de Zulueta, upon the latter's retirement, as Regius Professor of Civil Law in the University of Oxford, returning thus to All Souls College, where he had begun as a young Reader more than twenty-five years before, but now as the incumbent of England's foremost chair of Roman Law.

Soon after the beginning of his Regius Professorship, Jolowicz completed the revision of his *Historical Introduction* (preface dated October 1950; published as second

edition, Cambridge, 1952). In the twenty years since its first appearance the book had long become a classic; it had been reprinted with but little changes in 1939. The new edition not only showed alterations on a great many pages, in the text and the notes, and the author's consistent effort to incorporate the results of recent scholarship in the field, but also offered in a weighty Appendix much new material which, in many instances, amounted to specialized, terse dissertations on some of the most important topics of modern Romanistic debate. This new feature enhances the great usefulness, characteristic of the book from the day it first appeared, to both the apprentice and the mature scholar. Although Jolowicz modestly claimed to have given the latter no more than " a direction in which he might profitably dig," he has actually provided the reader with well-pondered judgments that will hold their own in the clash of learned opinions.

When Jolowicz first set out to write his *Historical Introduction,* there existed a definite need for a book of this scope in English legal literature. There has been no dearth of systematic presentations in English of the institutions and doctrines of Roman private law, and individual phases and aspects of its history have been treated by other writers before him. But Roman legal history as the continental schools since the nineteenth century have come to see it—largely under the impact of the German historical school—is a latecomer in the Anglo-American world of learning. From humanistic delight in legal antiquities, and from mere *prolegomena* on the agencies and sources of law, in the manner of Pomponius' *Enchiridion,* Roman legal history has grown into a complex and composite discipline, cutting across the boundaries of political and constitutional history, of classical philology, epigraphy, papyrology, and comparative jurisprudence;

and with new methods of textual criticism new vistas have been opened, for better or worse, of which even the founders of the Historical School did not dream.

Like the great continental treatises, from Karlowa to Arangio-Ruiz, Jolowicz's book encompasses the history of Rome's constitution, her political and social structure from the dawn of the Republic to the Bas-Empire; the history of legal sources and legal science; the developments of the procedural system and of criminal law in outline; and the main institutions of private law from the XII Tables to the end of the Republic. This leads the reader to the threshold of what must needs remain the proper subject of dogmatic presentation: the system of Roman private law in the classical jurisprudence and beyond (but a chapter on the chief characteristics of post-classical law is given by way of an epilogue). Thus we are provided with a universal historical framework in which to place the doctrines of Roman law, a framework which Jolowicz himself, with the quiet humor that was his own, has called " a version of *Hamlet* without the Prince of Denmark."

The book will remain, along with many of Jolowicz's more specialized papers, a noble tribute to the accomplishments of European historical jurisprudence, but one should not rashly count its author among the unswerving followers of the tenets of the Historical School. Occasional glimpses of his innermost preoccupation with the meaning of historical research for the lawyer of today can be caught from a great many asides in the *Historical Introduction*, e.g., from his restrained *caveat* against the optimism with which Riccobono has explained post-classical changes by the disappearance of the formulary procedure: " . . . in England," a footnote reads (2nd ed., p. 537 n. 1), " the abolition of separate jurisdiction for

Law and Equity has not yet produced, and perhaps will never produce, a fusion of the two systems." A lawyer as well as a historian, Jolowicz did not believe in history for history's sake. In some very illuminating pages on the English Civilians (*Current Legal Problems* 2 [1949] 139-54) he observed with regret that under the deep impression created by the German historical school in his own country so much interest has centered on expounding Gaius but so little on the living continuity of Roman law after its codification and on the many streams of European juristic tradition by which modern law is linked with the *Corpus iuris*.

In recent years he became more and more engrossed in the wealth of legal doctrines developed from the Roman materials by the medieval glossators and commentators. There was in him an affinity of spirit, bridging the centuries, with an illustrious predecessor in the Regius chair at Oxford: Alberico Gentili, the sober-minded defender of the *mos italicus* against the doctrinaire strictures of the humanists in the sixteenth century. The book on which Herbert Jolowicz was working at the time of his last illness was to deal with the Roman foundations of modern law. We will be all the poorer now that he did not live to complete it.

STEPHAN KUTTNER

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A select bibliography of writings by H. F. Jolowicz:

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MARRIAGE, SALE, AND GIFT IN THE HOMERIC WORLD[1]

To Ugo Enrico Paoli
on his seventieth birthday

THE prevailing view of Homeric marriage has two parts: (1) that the base was marriage by purchase; and (2) that new elements are visible in the poems, foreshadowing the time when marriage by purchase would be displaced by a formal marriage agreement, usually accompanied by a dowry.[2] Despite the almost complete acceptance this view has gained among jurists, it has never successfully resolved some of the more serious difficulties presented by the texts. Its most authoritative spokesman, Paul Koschaker, in his fundamental article on *Die Eheformen bei den Indogermanen,* repeatedly stressed the difficulties. We do

[1] This article is a revised and enlarged version of a paper read at the 9th International Congress of the Société d'histoire des droits de l'antiquité, held in Nancy, September 25-28, 1954.

[2] Thus, H. J. Wolff, "Die Grundlagen des griechischen Eherechts," *Tijd. v. Rechtsgesch.*, XX (1952), 1-29, 157-81, writes (p. 15): "Der Ursprung der Engye sucht man wahrscheinlich mit Recht in vorgeschichtlichen kaufehelichen Verhältnissen." For the acceptance of this view among non-jurists, note the flat assertion of Wilamowitz regarding the dowry passages in the *Odyssey*: "Der Dichter rechnet im Gegensatze zu dem alten Brautkaufe mit dem Rechte seiner Zeit"; *Die Heimkehr des Odysseus* (Berlin, 1927), 101. For full bibliographies on the supposed Homeric marriage by purchase, see Rudolf Köstler, "Raub- und Kaufehe bei den Hellenen," *Zeitschr. d. Savigny-Stiftung,* Rom. Abt. [*ZSS*], LXIV (1944), 209 note 20; "Ἔδνα, Ein Beitrag zum homerischen Eherecht," *Anzeiger Akad. Wiss. Wien, phil.-hist. Kl.* (1944), 6 note 2. Both articles have been reprinted in his *Homerisches Recht* (Vienna, 1950), but I shall cite the pagination of the articles, which are more accessible than the book. Köstler's work has been received most unfavorably, and it seems to be deliberately ignored in the most recent literature. I do not share this wholly negative judgment, despite certain weaknesses from which Köstler's analysis suffers. Köstler rejects the doctrine of marriage by purchase and links the "bride-price" with gift, and I am in accord, although our arguments and our conceptions of the institutional sides of both sale and gift diverge rather sharply, as I shall indicate later (without entering into a point-by-point critique).

not see the bridge, he wrote, "between marriage by purchase, which is still demonstrable in the Homeric period, and the later *engyesis*." Furthermore, the state of our sources regarding the emergence of free marriage in Greece "is particularly unsatisfactory." [3]

I propose to reexamine the matter in terms of two pairs of problems.

The first pair deals with sale and gift. The phrase, "marriage by purchase," is to be understood somewhat metaphorically. In the speech of most peoples who have (or had) the institution, the words meaning "bride-price" are different from the usual words for "sale-price"; and the verbs "buy" and "sell" are not used for a marriage. Marriage is never confused with the purchase of a slave woman. In the language of Homer, a wife might be called a "wooed bedmate," μνηστὴ ἄλοχος, never an ὠνητὴ ἄλοχος, a "purchased bedmate." Modern jurists speak of marriage by purchase, nevertheless, applying the test of whether or not "the conclusion of a marriage is controlled by rules of the law of sale." [4] What I shall do is put side by side what we know about Homeric marriage with what we know about Homeric sale, to see how this test survives. With sale, furthermore, I shall link the institution of gift-giving and gift-exchange.

The second pair of problems is (*a*) to distinguish between matters of fact and matters of law, between practices which may have been common but not essential, and juristic practices proper; and (*b*) to fix the place of marriage within the framework of Homeric society.[5]

[3] *Z. f. ausländisches u. int. Privatrecht*, XI Sonderheft (1937), 86, 112.

[4] *Ibid.*, 83-84.

[5] It is essential that I state my position regarding the Homeric poems as historical sources, a position which I have developed at some length in *The World of Odysseus* (New York, 1954), especially Ch. 2. I share the view that the *Iliad* took roughly the form in which we now have it in the eighth century, more likely in the latter half, and that the *Odyssey* was composed in the following century. The society of the poems was not only post-Mycenaean, but also post-Dorian (if there really was a Dorian invasion). This view has now been strongly confirmed by the first publication of the

I

Certain relevant, and generally undisputed, facts about Homeric marriage can be summarized rapidly.

1. Apart from several references to Odysseus' giving a wife to a slave, all marriages about which we are informed occurred exclusively among the most powerful nobles and chieftains, so that it is impossible to say anything at all about the law or customs of marriage among the commoners.

2. The most frequent procedure was for a man to obtain a wife by giving her father substantial gifts, often called *hedna*.[6]

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results of the Ventris-Chadwick decipherment of the Linear B script. Although there can be little doubt that the *Iliad* and *Odyssey* are composites made up of both older and later materials, *for the study of institutions* it is not possible to separate out the strands and segments. As Nilsson phrased it, we must reject the "patch-work hypothesis" which compares the poems to archaeological sites, with strata piled upon strata; "we ought rather to compare Greek epic poetry to a dough which was constantly rekneaded and rehandled. . . . This explains why very early elements were embedded in very late chants"; *Homer and Mycenae* (London, 1933), 212. What we have learned in recent years about the art of bardic composition argues in favor of treating the two poems as an essential unity insofar as institutions are concerned, portraying the Greek world in perhaps the tenth and ninth centuries B. C. (For one illustration of the contradictions to which the patch-work hypothesis leads, see note 59.)

It is necessary to be vigilant against anachronisms, but it is a fundamental mistake to treat every apparent contradiction and every exception to a supposed rule as infallible signs of interpolation or of stages in the composition of the poems. In the first place, many so-called interpolations and signs of the ubiquitous *Bearbeiter* are now known to be the formulaic repetitions essential to the craft of the bards, who were poets after all, not historians or jurists. Second, Homeric society was no perfectly ordered scheme; it had its rules and its exceptions, and its contradictions, and what seems to be a difficulty in the text may in fact be an accurate reflection of the way in which the society functioned. Finally, it is my view that Homeric society has to be studied from Homer alone, almost to the exclusion of any other Greek literary source, for the versions of the same tales in Pindar or Aeschylus or Apollodorus bear the unmistakable stamp of free treatment of the themes and of serious distortion of the institutional pattern. Above all, it is necessary to be extremely cautious with Hesiod, who was altogether personal and contemporary in his outlook. His century, the seventh, was the century of the emergence of the Greek *polis*-community, as unknown to the *Odyssey* as to the earlier *Iliad*.

[6] The word *hedna*, always used in the plural, will be examined in sect. III.

This is the so-called marriage by purchase. Not only is it attested in the largest number of specific cases, but it is further underscored by the word *anaednon,* used in special circumstances, such as Agamemnon's offer of a daughter to Achilles,[7] when a man could obtain a wife without giving gifts.

3. Another procedure, not uncommon, was the winning of a wife by an act of prowess or in an *agon,* a contest. Sometimes, the result was the acquisition of substantial wealth by the father, as when Melampus brought the cattle of Iphicles to Neleus,[8] so that we may think of the result as no different from the ordinary "bride-purchase"; but in other instances no gifts were involved at all, as in the contest among the suitors to see who could wield the bow of Odysseus.[9]

4. In three instances marriage by capture is either indicated or implied. One is the marriage of Paris and Helen;[10] the second is the statement of the captive Briseis that Patroclus had promised to give her in marriage to Achilles;[11] the third is a mention in a fragment of the *Thebais* that Oeneus obtained his wife as a prize in the sack of Olenus.[12] Some jurists have dismissed the whole notion of marriage by capture as an essential misunderstanding of the juristic act of marriage.[13] But for our purposes, it is enough to note that, as a matter of fact, we have two valid marriages which were

[7] *Il.* 9.146,288.

[8] *Od.* 11.288-97, 15.225-38.

[9] *Od.* 21.74-79. The fact that this particular contest was a trick on Penelope's part is irrelevant for our purposes.

[10] It is well established that the relationship between Helen and Paris was a legitimate marriage in every sense; see, e.g., Walter Erdmann, *Die Ehe im alten Griechenland* (Munich, 1934), 199.

[11] *Il.* 19.297-99.

[12] *Thebais,* frag. 6, in Apollodorus, *Bibl.* 1.8.4.

[13] E.g., Köstler, "Raub- und Kaufehe," 207-209; Koschaker, "Eheformen," 139.

preceded by capture, whether the victim was willing or unwilling, and one that was allegedly promised.[14]

5. Several marriages involved neither bride-gifts nor an *agon* nor capture. I do not propose to consider the problematical instances of Aeolus' six sons, who were married to his six daughters,[15] and of King Alcinous of the Phaeacians, whose wife Arete may have been his sister.[16] If they reflect a historical reality at all, it is of a world still older than Homeric society and almost totally destroyed by then. But neither Agamemnon's offer of his daughter to Achilles nor Alcinous's offer to give Nausicaa to Odysseus was anachronistic,[17] and they both included gifts to the husband instead of the reverse.

6. Altogether, clear reference to dowry—if I may use the word somewhat loosely—is made in eight instances, and there is a ninth in the Hymn to Aphrodite.[18]

7. With remarkably few exceptions, the marriages in the *Iliad* and *Odyssey* were between outsiders, that is to say, between a man from one community or *ethnos* and a woman from another. This fact is to be explained by the circumstance that the characters all moved in the highest circles, in which marriage was an important instrumentality for the establishment of ties of power among chieftains and kings.

8. Finally, although it was the rule for the woman to enter the *oikos* of her husband (or her husband's father), the re-

[14] Whether Patroclus' promise was made in earnest or as a joke is immaterial here.

[15] *Od.* 10.5-7.

[16] See Gilbert Murray, *The Rise of the Greek Epic* (3 ed., Oxford, 1924), 125-26.

[17] *Od.* 7.311-15.

[18] *Il.* 6.191-93, 251, 394; 9.147-56 (= 9.289-98); 22.51; *Od.* 1.277-78 (= 2.196-97); 7.311-15; *HAphr.* 139-40; and the four passages which indicate that Penelope had brought a dowry, *Od.* 2.132-33, 4.736, 23.227-28, 24.294 (on which see Erdmann, *Ehe*, 216). The sense of ἐεδνώσαιτο in *Od.* 2.52-54 is debatable; see below, note 49. There is also the passage, *Od.* 20.341-42, in which Telemachus says that if Penelope chooses a husband willingly, ἄσπετα δῶρα δίδωμι.

verse was far from unknown, whereby the husband entered the father-in-law's household and later became its head.[19]

II

Not once in either the *Iliad* or the *Odyssey* is there a sale transaction—even if we conceive "sale" very broadly—in which we can be sure that two Greeks were involved, or two Trojans. Either one of the parties is clearly identified as a foreigner, usually a Phoenician or a Taphian, or the poet fails to indicate the *ethnos* of the second party.[20] All the passages in the latter category, without exception, refer to the purchase of slaves, and the inference seems legitimate, from everything the poems tell us, that the sellers of slaves were customarily, and perhaps always, foreigners. Certainly there is no available instance in which a Greek or Trojan performed that role.

[19] This schematic presentation of the facts should include three more points —the promise of marriage, the nature of the marriage ceremony, and the role of the kinship group or extended family. They are considered in sect. IV. Something must be said here about the wooing of Penelope, which would seem to offer the best raw material for the study of Homeric marriage. It is my opinion, however, that Homeric marriage institutions can be studied only by ignoring this material in large part, first because what we have in the *Odyssey* is a confused, misunderstood, and often self-contradictory amalgam of strands in which no single institutional pattern can be rediscovered without arbitrary procedures; second because the juristic aspects have been forced into the background by what was essentially a power struggle. On the latter, I agree with Wilamowitz's dictum, *Heimkehr des Odysseus*, 103 note 2: "Freilich darf man auf das Recht nicht zu viel geben; Penelope ist im ϕ und τ ohne weiters gezwungen, sich einen Gatten zu nehmen, weil die Freier die Macht haben." See further Finley, *World of Odysseus*, 90-94. I do not know of a single attempt to unravel the rights and duties with regard to the marriage of Penelope which is not forced to fall back on arbitrary and self-serving arguments in distinguishing between the "old" and the "new" elements. This criticism applies not only to such an analysis as Erdmann's, *Ehe, passim*, but equally to the many efforts to bring consistency into other aspects of the Penelope story, such as W. Büchner, "Die Penelopeszenen," *Hermes*, LXXV (1940), 129-67. I shall of course make use of individual passages pertaining to Penelope, but never as a central part of the argument.

[20] I use the word "foreigners" instead of "outsiders" here because I mean not merely men from another community, but men from outside the Graeco-Trojan world altogether. It should be noted that Lemnos, the source of the wine freight discussed in the next paragraph, was not a proper part of the Achaean world in the Homeric poems.

Slaves, furthermore, were virtually the only objects bought by Greeks. The two exceptions are a shipment of wine sent from Lemnos to the Achaean camp, clearly an abnormal affair, and one reference to the purchase of jewelry from Phoenician traders.[21] There is no trace of the purchase of any of the basic elements of wealth apart from slaves, neither land nor metal nor cattle nor arms nor treasure.[22] There is nothing remotely comparable to the situation envisaged by Hesiod, when the poet warns his brother in unequivocal language: Watch out, lest because of your behavior your neighbor buy your *kleros* and not you his.[23]

Except in the instance of the Lemnian wine freight, from which the Achaeans in the field procured their wine supplies in return for bronze, iron, hides, cattle, and slaves—all taken as booty, I presume—, the objects which the Greeks gave in return for the slaves they purchased are not specified. Instead, the poet uses vague, general words, which can be rendered only by " substance " or " possessions " or " goods." [24] A great variety of things could conceivably have come under those headings, everything but land, in fact. But cattle, I am sure, were not normally included, despite the fact that it was cattle which served as the standard by which exchange ratios

[21] *Il.* 7.467-75 and *Od.* 15.415-16 (cf. 462-63), respectively. *Il.* 18.291-92, in which Hector says to Polydamas, πολλὰ δὲ δὴ Φρυγίην καὶ Μῃονίην ἐρατεινὴν κτήματα περνάμεν' ἵκει, is unclear to me. Even if the reference is to sale, which I doubt, it again involves foreigners; see Fritz Pringsheim, *The Greek Law of Sale* (Weimar, 1950), 93 note 2.

[22] By " treasure " I mean the prestige goods, such as gold and bronze tripods and cauldrons, which circulated so extensively among Homeric aristocrats, as gifts or prizes. In *Od.* 1.184, Mentes, a Taphian chieftain (actually Athena in disguise), tells Telemachus that he is carrying iron to Temesa in quest of copper. This is no exception to what I have said in the text, on several grounds; it is enough to point out that both Taphos and Temesa were in every sense outside the Greek world.

[23] Hesiod, *Works and Days* 341.

[24] The words are βίοτος, as in the long tale told by Eumaeus about the Phoenician traders who spent a year in his community and then kidnapped him as they were ready to sail: ἐν νηὶ γλαφυρῇ βίοτον πολὺν ἐμπολόωντο (*Od.* 15.456); ὦνος; and κτέανα (on which see note 27).

were established.[25] "But then Zeus son of Cronus took from Glaucus his wits, in that he exchanged golden armor with Diomedes son of Tydeus for one of bronze, the worth of a hundred cattle for the worth of nine cattle."[26] It is significant that, apart from the Lemnian wine-freight instance, Achaeans always gave something "worth X number of cattle" in exchange for something else, never "X number of cattle." Laertes purchased Eurycleia "with some of his possessions . . . and he gave the worth of twenty cattle."[27]

Given such a rudimentary and severely limited sales pattern, the notion of a Homeric marriage by purchase seems incongruous on the face of it. For purposes of discussion, however, let us instead accept as a base Pringsheim's view of Homeric sale, which is neither so sharply drawn nor so negative. Pringsheim believes that "in the interval between the Iliad and the Odyssey exchange is slowly transformed into sale"; that technical legal terms for buying made their appearance, though with limited application; and that "sale is still restricted to certain goods and is not yet clearly separated from exchange."[28]

[25] In this connection, it is worth quoting the following general statement from A. Hingston Quiggins, *A Survey of Primitive Money* (London, 1949), 4: ". . . many objects are called 'currency' which are never current. They may serve as standards of value or as a symbol of wealth . . . but they are never used in ordinary trading. They pass from hand to hand, or from group to group in important transactions, and play a large part in gift-exchange and in 'bride-price' . . . ." (Mrs. Quiggins puts quotation-marks around "bride-price" because, like many anthropologists, she rejects the sales implication in the phrase.)

[26] *Il.* 6.234-36.

[27] *Od.* 1.430-31. This is the decisive Homeric text for excluding cattle from the κτέανα of this formula, which also appears in three other places in the identical phrasing, πρίατο κτεάτεσσιν ἑοῖσιν (*Od.* 14.115, 452; 15.483), each time with reference to the purchase of a slave. Pringsheim, *Sale*, 93, repeats an old error when he writes, with these four texts specifically in mind, that "the price is paid in cows or cow-value."

[28] The quotations are from his *Sale*, 95. On the very narrow limits within which he believes it possible to speak of a sales terminology, see especially p. 93; cf. P. Chantraine, "Conjugaison et histoire des verbes signifiant vendre . . . ," *Rev. de Phil.*, n.s., XIV (1940), 11-12.

Now the proposition is that marriage by purchase exists whenever "the conclusion of a marriage is controlled by rules of the law of sale." One immediate difficulty arises from the fact that it is exceedingly rare for a people to apply the language of sale to marriage, as Koschaker recognized in his last work on the subject. His answer was that it is nevertheless proper for the legal historian, by construction, to demonstrate how in fact marriage and sale agree in their juristic structure, when that is the case.[29] But for Homeric law, if, according to Pringsheim's view, the emergence of sale only *began* in the period between the *Iliad* and the *Odyssey,* and did not proceed very far in the *Odyssey* either, I do not see how it is possible, even by the most skillful construction, to bring the law of marriage into conformity with a barely emergent law of sale. Proponents of the marriage-by-purchase view, we must remember, do not think of it as emerging in the Homeric period, but as beginning to decline. They thus imagine a situation in which a dying juristic structure was modeled after one just coming into being. That is obviously impossible.[30]

[29] P. Koschaker, "Eheschliessung und Kauf nach alten Rechten . . . ," *Archiv Orientální,* XVIII, 3 (1950), 210-96, especially pp. 211-14, 234-35. It is worth noting that in Babylonia the language of marriage and the language of sale did coincide at one important point; *ibid.,* 215-20.

[30] In this connection it is important to note Mrs. Quiggins' conclusion (*Primitive Money,* 7-10) that "bride-price" and wergeld precede trade in the establishment of "monetary" standards of worth. A number of legal historians have apparently been troubled by some of the same considerations I have raised, but they were caught in the end by the magnetism of the marriage-by-purchase doctrine. Thus, E. F. Bruck, *Totenteil und Seelgerät* (Munich, 1926), 59-63, upsets a good, though brief, appreciation of the role of gifts in Homeric society by injecting the following: "Hier liegt juristisch bereits ein Kaufpreis vor, mag auch noch von Geschenken gesprochen werden." This bald statement receives no justification, or even explanation, and it is meaningless in the light of his own account of Homeric sale (pp. 63-66). A similar discrepancy will be found in C. W. Westrup, "Ueber den sogenannten Brautkauf des Altertums," *Z. f. vergl. Rechtswiss.,* XLII (1927), at pp. 109-14, so that Koschaker, "Eheformen," 79 note 3, could dismiss his views as "widerspruchsvoll." Köstler, "Raub- und Kaufehe," 209-24, opposes the

Koschaker insisted, furthermore, that by "sale" he meant in particular the sale of real property, not the sale of slaves and movables. The latter, he argued, usually involved foreigners and hence mutual distrust, and could not have been a model for marriage law.[31] But this is precisely what we find in Homer. What rules of the law of sale could there have been in a society in which sales transactions were restricted to the acquisition by exchange of slaves and jewelry brought in by foreigners, who entered the Homeric world as rightless men, permitted to come on sufferance and conduct their exchange at arm's length, and then required to leave immediately? There could have been nothing more than bargaining until a mutually acceptable basis of exchange was reached, followed by a simultaneous exchange of the agreed-upon objects and the departure of the foreigners.[32] Nothing short of the actual exchange itself could have been binding upon either party; and once the foreigners went away, there could have been no action of any kind for redress of error or fraud. An uncompleted sale was a nullity; a completed sale was irrevocable, regardless of conditions, terms, or consequences.

III

If sales were rare and altogether peripheral in the Homeric world, exchanges were frequent and indispensable under a great variety of circumstances—not in the form of sale but

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marriage-by-purchase doctrine vigorously, but he fails to come to grips with Koschaker's sophisticated attempt to rescue it, and he discredits his position by such arguments as the following: "Was taten die armen Teufel . . . ? Sie waren nicht mächtig genug, um zu rauben, und nicht reich genug, um zu kaufen" (*ibid.*, 215). This argument is false in fact and irrelevant in logic.

[31] Koschaker, "Eheschliessung und Kauf," 212-14.

[32] With reference to the Mentes passage, *Od.* 1.184, Pringsheim writes (*Sale*, 92): "barter still exists especially in the commerce with foreigners who have not accepted the Greek method of payment." I cannot imagine what the "Greek method of payment" was in this period, but, apart from that, the statement is misleading because, as Pringsheim recognizes all through his own discussion, all "commerce" was in fact trade with foreigners.

in the form of gift-exchange.[33] In essence, Homeric gift-giving was normally a bilateral action, not a unilateral one. Although it retained the outward appearance of a free, voluntary act, it came very near to being obligatory. For all practical purposes, every gift either was a return for a gift or service already received or compensation for a wrong committed, or it was intended to provoke a counter-gift, sometimes immediately and sometimes at a future date, not necessarily specified. In the second type, the giver often took a risk, as in the parting-gift to a guest-friend. When the returning Odysseus first met his father, the hero was still in disguise and he told Laertes a fanciful tale about having received Odysseus as his guest-friend five years before and having given him numerous gifts. Laertes, certain that his son was dead, commented as follows: "The countless gifts which you gave, you bestowed in vain. For if you had found that man still alive in the land of Ithaca, he would have sent you on your way well provided with gifts in return." [34]

Gifts of wooing were precisely comparable. They were given to the girl's father with the intent of provoking a counter-gift, the girl in marriage.[35] "For this was not the

[33] See Finley, *World of Odysseus*, Index *s.v.* Gifts; L. Gernet, "Droit et prédroit en Grèce ancienne," *L'Année sociologique* (1948-49), 21-119, especially Part I, "Debitum et obligatio." See also the extensive bibliography on primitive gifts and gift-exchange in M. J. Herskovits, *Economic Anthropology* (New York, 1952), Ch. 8.

[34] *Od.* 24.283-86.

[35] The notion of "provoking" a counter-gift, that is, of imposing an obligation on the recipient to make a return, is central to the sociology of gift-giving; see Gernet, "Droit et prédroit," 26-30, on archaic Greece. Classical Greeks saw evidences all around them, though they no longer fully understood the psychology. See, e.g., Thuc. 2.97.3-4 on Thrace; Xenophon, *Cyropaedia* 8.2.7-10, on Persia; and the analysis of M. Mauss, "Une forme ancienne de contrat chez les Thraces," *Rec. des ét. gr.*, XXXIV (1921), 388-97. Perhaps a similar misunderstanding lies behind the detailed, though admittedly second-hand, description of the auctioning of brides in Babylonia given by Herodotus (1.196). Nothing has been uncovered in Babylonian sources which substantiates his story; see W. Baumgartner, "Herodots babylonische und assyrische Nachrichten," *Archiv Orientální*, XVIII, 1-2 (1950), at pp. 79-80; O. E. Ravn, *Herodotus' Description of Babylonia* (Copenhagen,

procedure of suitors in time past," was Penelope's reproach. "Whoever wished to woo a good lady and the daughter of a rich man, and vied with one another . . . gave splendid gifts." [36] The counter-gift was commensurate with the original gift, hence the daughter of a rich man inspired especially great gifts of wooing. But, as with the parting-gift to a guest-friend, there was always the risk that the gifts would be given in vain. The daughter of a rich man would have many suitors, competing with their gifts, and all but one would have given theirs in vain. "He is surely most blessed of heart above all others," Odysseus said to Nausicaa, "who shall prevail with gifts of wooing and lead you to his home." [37] And lest any reader miss the point, one of the scholiasts carefully explained that Odysseus meant "prevail over the other suitors." [38]

1942), 89. Aristotle, *Pol.* 2.5.12,1268*b*40, speaks of "ancient laws" (*ἀρχαῖοι νόμοι*) by which "the Greeks bought their wives from one another" (*τὰς γυναῖκας ἐωνοῦντο παρ' ἀλλήλων*), and this bald statement is commonly quoted as proof of Homeric marriage by purchase. I doubt that Aristotle's reference is to Homer; in fact, the one Aristotelian statement I could find about marriage in Homer which is explicit (*Rhet.* 2.24,1401*b*34) says that Helen married Menelaus as a matter of free choice on her part, a choice given her by her father. The context of the half-sentence in the *Politics*, which does not mention Homer, is that of the archaic, but post-Homeric, law codes. Alternatively, we must again consider the possibility of classical Greek misunderstanding of the fine shadings of gift-giving as it operated in a more primitive world, with its elements of grasping acquisitiveness.

[36] *Od.* 18.275-79.

[37] *Od.* 6.158-59. The key words are *ὅς κέ σ' ἐέδνοισι βρίσας*· Cf. Penelope's use of *ἀλλήλοις ἐρίσωσιν* in 18.277, the passage just quoted. It marks a significant departure when, in the early sixth century, Cleisthenes, tyrant of Sicyon, gave each of the unsuccessful suitors of his daughter a gift of one talent in compensation for his wasted time and effort; Herod. 6.130.

[38] Köstler, "Ἕδνα," 8 note 4, saw that the risk factor in the *hedna* is a further argument against considering them to be a purchase-price. Other clearcut Homeric references to competitive gift-giving among suitors are *Od.* 15.16-18 and 16.390-92 (= 21.161-62). By far the best illustration in all the literature is the long papyrus fragment on the wooing of Helen (Hesiod, frag. 94 and 96, ed. [2] Rzach). Although this may be a late text—Wilamowitz dated it as not earlier than the end of the sixth century B.C.—both the account and the language are fully consonant with the Homeric materials.

The reason for gift-giving in wooing was simply that gift-giving was a part of all important occasions. Marriage was, of course, a major occasion, and particularly so in the upper social circles in which the Homeric heroes moved. There a marriage was, among other things, a political alliance; in fact, marriage and guest-friendship were the two fundamental devices for the establishment of alliances among the nobles and chieftains. And the exchange of gifts was their invariable expression of the conclusion of an alliance.[39]

In those circles, there could be no question of compensating the father for the loss of his daughter's services. That notion is indeed to be found in many parts of the world, expressed quite openly, and it has been used to explain why a bride must be "purchased" from her father. But there is not a word in Homer to suggest this idea, and it seems altogether inappropriate for the daughters of Homeric kings and chieftains. It was not to repay Alcinous for the loss of Nausicaa's services as laundress that the suitors for her hand were expected to vie in the magnitude of their gifts, but to attain the high standard befitting the daughter of a man of superlative status and wealth.

It has been observed that in value (as expressed in cattle) the *hedna* were many times greater than the largest given value of a purchased slave woman. But it has not been so clearly noticed that the *hedna* were immediately comparable in value with the gifts exchanged on other important oc-

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Note particularly 94.23-25, where Odysseus reveals his craftiness by refusing to take a hopeless risk: he sent no gifts, "for he knew in his heart that golden-haired Menelaus would triumph (*νικήσει*), for he was the greatest of Achaeans in possessions (*κτήνει*)."

[39] Professor Armand Abel of the University of Brussels has suggested to me the possibility of an etymological link between *ἕδνα* and Germanic *wedh in an original meaning of "knüpfen, binden." If this idea should prove well-founded, it would add a strong linguistic argument to the alliance basis of the gifts. One need only turn the pages of Herodotus to discover that in "international relations" gift-giving continued to be important, even essential, long after the end of the heroic age.

casions.[40] It was characteristic of the Homeric aristocrats that they demanded value even in the most honorific trophies, that neither cowrie shells nor laurel wreaths came within their purview. Gift objects had intrinsic value as gold and silver and cattle—that was what gave them their prestige values.[41] "Choose a very beautiful one," is Mentes' suggestion to Telemachus regarding the latter's proferred parting-gift, "that will bring you a worthy one in exchange."[42] Hence the atmosphere of bidding and bargaining around the marriage gifts—Penelope's "father and brother are now bidding her marry Eurymachus, for he outdoes all the suitors in gifts and he has greatly increased his gifts of wooing."[43] But it is a misreading of the entire pattern of behavior with regard to wealth to see in the bidding evidence of a sales approach.[44]

[40] L. Gernet, "Hypothèses sur le contrat primitif en Grèce," *Rev. des ét. gr.*, XXX (1917), 287, draws the following conclusion from the size of the *hedna*: "Eh biẽn, un individu ne possède pas cent boeufs: c'est le clan qui les possède" (cf. his recent "Droit et prédroit," 112-14). Not only is there no evidence for this statement—thus, Eumaeus' enumeration of the possessions of Odysseus (*Od.* 14.98-104) is personal, not familial—but it overlooks the magnitude of gift-giving on all occasions, always personal in my judgment. That all these figures are conventional and grossly exaggerated is no doubt true, but that is not germane to the issue.

[41] See Finley, *World of Odysseus*, 129-33.

[42] *Od.* 1.318.

[43] *Od.* 15.16-18.

[44] Much has been made of the word ἀλφεσίβοια ("cattle-bringing" to the father) as an epithet for a marriageable daughter. But the fact is that it appears exactly once in the poems, *Il.* 18.593 (and once in *HAphr.* 119). The antonym, πολύδωρος ("bringing many gifts" to the husband), which is found three times (*Il.* 6.394; 22.88; *Od.* 24.294; cf. ἠπιόδωρος in *Il.* 6.251), reveals the gift sense clearly, and it was perfectly consonant with Homeric mores for the gift potential to be underscored so explicitly. It seems significant, furthermore, that whereas in sales cattle served only as a standard, and were not exchanged except perhaps under emergency conditions, they were enshrined in the word ἀλφεσίβοια, and they were in fact given as marriage-gifts, just as they were transferred in other gift situations. This pattern in the differentiated use of cattle is widely attested for many parts of the world among more primitive peoples, most commonly, perhaps, among African tribes; see Quiggins, *Primitive Money*, Index *s. v.* Cattle.

The Homeric language of gift-giving in marriage is revealing in part, and at the same time it is ambiguous and misleading. The one point which is certain is that not once does Homer employ in a marital context any of the words which appear in connection with sales, whereas from time to time he resorts to outright gift terminology.[45] The gifts of wooing are almost invariably called *hedna.*[46] The "dowry" terminology, however, is much more varied—*hedna* is used two or three times only, and otherwise the poet employs general phraseology of giving, symbolized by the descriptive adjective, *polydoros,* that is, "bringing many gifts" to the husband.[47]

It is the word *hedna* itself which has proved the most troublesome. Thirteen times it means the gifts from the suitor to the girl's father, and three times the word *anaednon*

[45] A study of the language of Greek gift-giving has never been undertaken. See the suggestive remarks of E. Benveniste, "Don et échange dans le vocabulaire indo-européen," *L'Année sociologique* (1948-49), 7-20.

[46] The passages with the word *hedna* are given in note 48. In *Il.* 11.243, the phrase is πολλὰ δ' ἔδωκε, for which there is an interesting parallel in *Od.* 8.269 (Ares' gifts of seduction to Aphrodite); in *Od.* 15.367 we read μυρί' ἔλοντο (gifts of wooing, but from the viewpoint of the parents). Δῶρα appears in *Od.* 18.279, where, it can be argued, the choice of words is determined by the fact that the gifts went to the woman herself, in this instance Penelope (but see below, at notes 56-57). In *Od.* 15.16-18, Athena says to Telemachus that Eurymachus περιβάλλει ἄπαντας μνηστῆρας δώροισι καὶ ἐξώφελλεν ἕεδνα. The consensus is that δῶρα and ἕδνα are distinct here, the former being gifts to the bride, the latter gifts to her father; see the bibliography in Köstler, "Ἕδνα," 19 note 2. I am tempted, however, to treat them as synonyms. In Hesiod, frag. 94 and 96, we find the two words used interchangeably, without a shadow of distinction; e.g., δῶρα in 94.23,49 (or δωτίναι in Wilamowitz's reconstruction); 96.1; and ἕδνα in 94.39, 44; 96.5. There is surely no objection in principle to understanding such a coupled phrase in Homer to be merely repetitive of a single idea.

[47] In the dowry passages listed in note 18, *hedna* appears only in *Od.* 1.277-78 (= 2.196-97) and perhaps also in the verb ἑδνόω of *Od.* 2.52-54. In *HAphr.* 139-40, ἄποινα is used in a context in which "dowry" seems certainly to be the meaning. That is strange and I can offer no explanation.

(" without *hedna* ") indicates a marriage without such gifts.[48] In a reference to Penelope, which is repeated word for word a second time, *hedna* means " dowry," and in another passage the related verb appears in a context which permits no decision about the sense.[49]

The fact that the same word could have two opposite meanings has been a stumbling-block to commentators ever since the ancient scholiasts.[50] If the *hedna* are understood as purchase-money, there is no satisfactory way out. Some have sought a solution by suggesting that the father gave back all or some of the purchase-money as a gift to his daughter, thereby providing her with a form of security.[51] This suggestion is impossible on the evidence.[52] That the bride did receive gifts is a fact, of course. Helen, for example, gave

[48] I have included in these figures the single use, in *Il.* 13.382, of ἐδνωταί " those who seek or receive *hedna*." Ἔδνα appears in *Il.* 16.178, 190; 22.472; *Od.* 6.159; 8.318; 11.117, 282; 13.378; 15.18; 16.391; 19.529; 21.161; ἀνάεδνον in *Il.* 9.146, 288; 13.366.

[49] The Penelope passages are *Od.* 1.277-78 and 2.196-97. In *Od.* 2.52-54, Telemachus complains of the suitors: οἳ πατρὸς μὲν ἐς οἶκον ἀπερρίγασι νέεσθαι Ἰκαρίου, ὥς κ' αὐτὸς ἐεδνώσαιτο θύγατρα δοιη δ', ᾧ κ' ἐθέλοι καὶ οἳ κεχαρισμένος ἔλθοι. Virtually all commentators and translators take the key phrase to mean, that her father " may himself set the bride-price for his daughter." From the context, however, " that he may himself dower his daughter " is equally possible; see Wilamowitz, *Heimkehr des Odysseus*, 102. The virtual unanimity in favor of the other alternative merely reflects the prevalence of the marriage-by-purchase doctrine. Hesychius, *s. v.* πολύδωρος, gives πολύεδνος as a synonym (" well-dowered "), but I know of no text in which the word appears.

[50] For the scholiasts, see not only their comments on the passages listed in note 49, but also on Pindar, *Ol.* 9.10 and *Pyth.* 3.94, where ἔδνον and ἔδνα, respectively, clearly mean gifts to the groom.

[51] This view lies at the heart of the still widely cited study by G. Finsler, " Ἔδνα," *Hermes*, XLVII (1912), 414-21. He believes that in the *Odyssey*, at least, virtually all the gifts, regardless of source, were given to the bride. To establish that point, he handpicks his passages and offers arbitrary translations and generalizations. Nevertheless, he has gained not a few adherents, e.g., O. Schulthess, " Φερνή," *PWRE*, XIX (1938), 2041.

[52] On the *hedna* given by the groom to the father, Hephaestus' remark, *Od.* 8.317-19, is decisive regardless of the value of the passage in other respects (see further notes 59 and 87).

Telemachus a fine garment for his bride to wear on her wedding-day.[53] Such a gift, however, was part of a trousseau, neither to be compared nor to be confused with the cattle and treasure given as *hedna* to the girl's father, or with the genuine dowries, such as the massive one promised by Agamemnon to Achilles.[54] The suitors, it is true, gave Penelope gifts directly after she reproached them for their failure to woo in the approved fashion;[55] but one may not generalize from this instance, because the whole point to the suitors' behavior—if one may properly draw any conclusion from the Penelope story—was their refusal to go to Penelope's father,[56] so that there is an element of mockery in the gifts they gave her at the last moment.[57] Both the language Agamemnon used regarding his proferred dowry to Achilles and the reference to the dowry received by Priam along with his wife Laothoe leave no doubt that the rule was for the dowry to be given to the husband.[58]

[53] *Od.* 15.125-27; *cf.* Athena's remarks to Nausicaa, *Od.* 6.26-28.

[54] On the need to distinguish between trousseau and dowry in later Greek practice, see H. J. Wolff, "Marriage Law and Family Organization in Ancient Athens," *Traditio*, II (1944), at pp. 57-58; L. Gernet, "Notes de lexicologie juridique. 3. Φερνή," *Annuaire de l'Inst. de phil. et d'hist. or. et slaves*, V (1937), 396-98.

[55] *Od.* 18.284-303.

[56] *Od.* 1.276-78, 2.52-54.

[57] In another context Penelope speaks of the slave Dolius as having been given to her by her father when she married Odysseus (4.736)—*δμῶ ἐμόν, ὅν μοι δῶκε πατὴρ ἔτι δεῦρο κιούσῃ*—, and this seems to be an instance of the dowry going to the daughter. But again it would be false to generalize. First, Dolius turns out to be a slave in the *oikos* generally, not Penelope's personal slave (see *Od.* 24 *passim*). Second, it is highly doubtful that a woman could in any proper sense be said to own slaves or the other basic forms of wealth.

[58] *Il.* 9.148,290 and 22.50-51, respectively. Agamemnon characterized his offer as a dowry *ὅσσ' οὔ πώ τις ἐῇ ἐπέδωκε θυγατρί*, "as no one yet ever gave along with his daughter." On the sense of *ἐπέδωκε θυγατρί*, cf. Wolff, "Marriage Law," 57, for an Attic parallel; the objection I raised to Wolff's translation in my *Studies in Land and Credit in Ancient Athens* (New Brunswick, 1952), 243 note 53, was mistaken.

Most scholars have preferred a two-stages explanation, namely, that *hedna* as dowry, the rare use, appears in the latest portions of the poems and demonstrates that the shift was already under way from bride-purchase to the classical Greek form of marriage.[59] At best, this resort to a distinction between early and late strata in the poems, a dubious one in any event, could explain a linguistic anomaly, but not the actual marriage-gift pattern. Commonly the argument becomes circular. Because *hedna* almost always means "bride-price," the argument runs, its use for "dowry" is a late aberration. The shift in meaning came when the dowry appeared on the scene and began to replace the bride-price. And the proof of that sequence is deduced from the use of the word *hedna,* thereby completing the circle.[60]

The essential weakness in that picture, apart from the fallacy in the very notion of marriage by purchase, is that

[59] It is enough to cite Erdmann, *Ehe* 218-20 and *passim*. In connection with the *hedna* which Hephaestus says he will demand back from Aphrodite's father (see below, note 87), Erdmann has no choice but to argue vigorously (p. 301 note 3) that, although the text appears in one of the latest sections of the poems, it is a holdover from much earlier times. He thus argues both ways, once that the appearance of the word *hedna* in "late sections" indicates a shift in both sense and institution, and on another occasion that we may—indeed, must—ignore the "lateness" of the passage. This is not an isolated instance of such reasoning, but the inevitable consequence of attempting institutional analysis from the "patchwork hypothesis" of the composition of the poems (see above, note 5). Proponents of the two-stages view of *hedna*, it should also be noted, have made much of the fact that the etymological dictionaries give a number of Indo-European parallels for the "bride-price" sense of *hedna*. They seem to overlook other instances in Boisacq, where the meaning is clearly and unequivocally "dowry."

[60] The question may also be asked, why was there a specific word allegedly meaning "bride-*purchase*" before there were any other words meaning "buy" and "sell"? And how can that be reconciled with the thesis that marriage by purchase is modeled after the juristic structure of sale? In general, there is an unfortunate tendency to invent categorical distinctions among closely related words used by Homer. Not only was he no professional jurist, drawing fine distinctions between one type of gift and another, but often purely metrical considerations were decisive, as in the avoidance of the word δεσπότης, on which see P. Chantraine, "Les noms du mari et de la femme, du père et de la mère en Grèce," *Rev. des ét. gr.*, LIX/LX (1946-47), at p. 222.

dowry is fully attested in all sections of the poems, early as well as late. In fact, there is only one instance in the *Odyssey* of a gift from father to groom, if we exclude the Penelope passages, whereas there are five distinct dowry instances in the *Iliad*.[61] Nor is there justification for an either-or conception, either bride-price or dowry. Andromache is called Hector's ἄλοχος πολύδωρος ("wife who brought many gifts"), even though he won her ἐπεὶ πόρε μυρία ἕδνα ("having given numerous gifts of wooing").[62] There is no ground, therefore, for holding that a basic shift in the whole marital-gift situation was taking place during the period in which the Homeric poems were being shaped, regardless of the terminology.

Curiously, there is no special word in Homer for "dowry," neither *pherne* nor *proix,* common in later Greek, nor anything else. The occasional use of *hedna* may indicate nothing more than an attempt to fill out the gap, by a procedure which would have been absurd if *hedna* meant "bride-price," but which is not unintelligible in gift terms. Although gift-giving went on in a great variety of situations, three particular contexts were of such special significance that an individualized terminology was developed for the respective gifts. One was the gifts of compensation for a wrong—*apoina;* a second the gifts of guest-friendship—*xeineia;* and the third the gifts of marriage—*hedna. Xeineia* and *hedna,* I suggest, were precisely comparable; the one meant gifts accompanying guest-friendship, the other the gifts accompanying marriage, and the same word could be used regardless of the direction in which the gifts traveled.

[61] See the references in note 18.

[62] *Il.* 6.396 and 22.472, respectively. The fact that the two sides of the Hector-Andromache marital gift exchange are related at such a distance from each other should serve as a warning. The poet does not give a full account of any marriage, only details embedded in formulas. Therefore neither a statistical analysis nor an argument from silence is decisive, or even necessarily meaningful.

It seems likely that the girl herself was sometimes considered the counter-gift and that no dowry accompanied her. But the more common practice, I believe, was for an exchange of gifts, in addition to the hand of the girl. That would have been more consonant with the general gift-giving pattern of the age. Peculiar or unusual circumstances were probably present whenever no dowry was given, though we cannot expect the poet to inform us so precisely.[63] As for gifts from the suitor, it is interesting that in the two instances in which the winning of a wife is expressly labeled *anaednon,* "without gifts of wooing," the special conditions are clearly defined. One is Agamemnon's offer of compensation to Achilles, his daughter to wife *anaednon,* and a dowry so great "as no one ever yet gave along with his daughter."[64] The other is the promise of Cassandra to Othryoneus, should he succeed in his boast that he could drive off the Achaean army.[65] But again we are ill-informed on the whole, for there are not a few marriages about which nothing is said in this respect, either that there were gifts in one direction or the other, or that there were none. The historian must therefore fall back on his judgment of the pattern, and mine, as I have already indicated, is that an exchange of gift-objects was the rule, and that the exceptions stemmed from one or another peculiarity in the situation between the two male parties, the groom and the father.

[63] It was an error when I wrote in *World of Odysseus,* 64, that "there could be no marriage" without a dowry.

[64] *Il.* 9.146-48 (= 9.288-90). It is the size of the dowry which is unprecedented, whereas the language implies that a dowry, as such, was certainly not a subject for comment.

[65] *Il.* 13.363-69. In the matter of terminology, note how Idomeneus mocks the corpse of Othryoneus: We Achaeans will make a similar promise to you, and give you the fairest daughter of Agamemnon, if you will help us capture Ilion, "for we are no bad ἐεδνωταί" (*Il.* 13.374-82). (Köstler, "Ἕδνα," 15-16, and others take ἐεδνωταί to mean "dowry-givers," thereby destroying the point to Idomeneus' sneer.) Here the *hedna* were acts of prowess, not gifts of wealth, a shift in meaning which was perfectly proper in a world in which wealth and prowess, along with honor, were the goods of the value system; but which would have been difficult to comprehend if a bride were purchased.

IV

The next question is whether the exchange of gifts, though the approved practice and a matter of great interest to the social historian, was of essential significance juristically. In this connection we may recall the account in Herodotus of the *agon* by which Cleisthenes of Sicyon chose a husband for his daughter Agariste about 575 B. C. The year-long *agon* served to guide Cleisthenes in the selection of his future son-in-law, but the act which sealed the marriage was a verbal exchange, more or less formal: ἐγγυῶ-ἐγγυῶμαι.[66] The marriage would have been just as valid had Cleisthenes made his choice by some other method—walking in the *agora* of Sicyon, for example, and designating the tenth male he encountered—provided only that the two men then exchanged the solemnities of ἐγγυῶ-ἐγγυῶμαι.

On the face of it, the Homeric *hedna* were analogous to Cleisthenes' *agon*—a ritual device for mate selection. In fact, the giving of *hedna* often became an *agon,* the girl going to the most generous giver. But since valid marriages were possible—and occurred—without such preliminaries, we are forced to the conclusion that the *hedna,* for all their importance, were either irrelevant juristically or necessary only under certain conditions.[67] Two further problems then arise.

1. Were there more ways than one to conclude a juristically valid marriage? As a general proposition, Koschaker distinguished between what he called, after the Germanic terminology, *Muntehe* and *muntfreie Ehe,* that is, marriages in which the wife became subject to the husband's authority and free marriages in which the husband acquired no *Ehegewalt* and in which the children usually belonged to the mother's kinship group. It was the *muntfreie Ehe,* he argued, which gave rise in various legal systems to the formless marriage resting essentially on the consent of the parties. In Homeric Greece,

[66] Herod. 6.126-30.

[67] The fact that *hedna* were not indispensable is another argument against the marriage-by-purchase doctrine; see Köstler, "Ἕδνα," 20.

however, there is no trace of a marriage in which the husband does not have *Ehegewalt*. Even in Phaeacia, where Arete the queen seems to have power far beyond that of any other woman in the poems, we are told explicitly that "on Alcinous here depend deed and word." [68] Further, we must emphasize again that most of the Homeric marriages were between outsiders, precisely the situation in which, in other legal systems, the *muntfreie Ehe* emerged, but not here insofar as the available evidence goes. Nor have I been able to find any other combination which reveals a pattern. There were *hedna* from the groom to the father-in-law when the wife joined her husband's household and when the husband joined the father-in-law's household.[69] And there were dowries in both types of situation.[70]

2. If *hedna* were not indispensable, was there something else, some other act or ceremony which was? To this question I can find no really satisfactory answer, partly because the evidence of the poems is so fragmentary, and partly because here we move into an area in which we are face to face with what Gilbert Murray calls "Homeric expurgations." [71] In the poems as we now have them, there was systematic expurgation of a whole complex of rites and rituals: human sacrifice, brother-sister marriage, blood covenant, and so on. Now we know that *gamos* means both "marriage" and "mar-

[68] *Od.* 11.346. Then there is Zeus' threat (*Il.* 15.14-22) to whip Hera in punishment for disobedience, coupled with his reminder to her of the time when he had hung her by the wrists, with anvils attached to her ankles.

[69] E.g., wife to husband's household: *Il.* 16.189-90; 22.470-72; *Od.* 8.317-19; 11.281-84; 15.367; husband to father-in-law's household: *Il.* 11.221-26 and 241-45, taken together; cf. Hesiod, frag. 94 and 96. The comparative infrequency of the latter type is nothing more than a reflection of the fact that in Homeric marriage it was normally the woman who changed households. This obvious point must be stated explicitly because of the strange ways in which scholars have sometimes discussed these exceptional cases in order to defend the marriage-by-purchase thesis.

[70] E.g., wife to husband's household: *Il.* 6.394; 22.49-51; husband to father-in-law's household: *Il.* 6.191-95; *Od.* 7.211-15.

[71] Murray, *Greek Epic*, Ch. 5.

riage-feast" in Homer, and the two senses seem so interchangeable that in several passages it is impossible to decide between them.[72] There is no evidence of sacralism connected with marriage in our texts, yet it is tempting to think that at the feast some specific ritual action was performed—a hand rite, for instance, or a blood-covenanting rite—which was the decisive act establishing a valid marriage relationship. But there is little ground for succumbing to the temptation. One trouble is that the *gamos* apparently could be held without the presence of one of the parties, as in Menelaus' *gamos* for his daughter Hermione, who was subsequently sent off to her husband, the son of Achilles, in Thessaly.[73]

The *Odyssey* uses two different phrases here. First it is said that Menelaus was sending Hermione "to the son of Achilles," and then, a few lines later, "to the famous ἄστυ (city) of the Myrmidons."[74] The somewhat more common phrasing in the poems is "to lead (or send) to (or from) the *oikos* or *doma* of so-and-so."[75] I do not believe that this language means that a formal transfer from one *oikos* to another was accomplished by some set ritual or formal phraseology, although such a conclusion cannot be ruled out. But this emphasis on the household does point to the essence of the marriage relationship, and from there to the ultimate power of decision as to whether any given marriage was valid or not.

In classical Greece the legal validity of a marriage was a matter of public concern, for it established both the citizenship of the children and the application of the laws of in-

[72] E.g., *Od.* 6.27, 15.126.

[73] *Od.* 4.3-14. In general it is correct to say that there was no ceremonial occasion without feasting, as there was none without gift-giving; see Finley, *World of Odysseus*, 133-36.

[74] Cf. the wording in *Od.* 15.367 regarding Ktimene: Σάμηνδ' ἔδοσαν.

[75] *Il.* 9.146-47; 16.190; 22.471-72; *Od.* 6.159; 15.237-38. Cf. Penelope's phrase when she set the bow contest: τῷ (the winner) κεν ἅμ' ἑσποίμην νοσφισσαμένη τόδε δῶμα κουρίδιον (*Od.* 21.77.78); or Alcinous' proposal that Odysseus παῖδά τ' ἐμὴν ἐχέμεν ... αὖθι μένων (*Od.* 7.313-14).

heritance. It was primarily around the legitimacy of the children that the law of marriage gravitated.[76] This pivotal point, however, was missing in Homeric Greece, where there was no *polis,* no citizenship, no political problem of legitimacy.[77] Who then drew the distinction, which clearly did exist, between a wife and a concubine? The answer lies in one of two directions: either this matter lay within the jurisdiction of the kinship group, or it lay within the much smaller body, the *oikos,* the household.

My choice is the latter, the *oikos,* and not the larger kinship group. Despite the prevailing view, I can find no evidence of clan authority at all in the poems outside of one clearly defined area, that of the blood-feud.[78] For our present purposes, however, it is enough to make the single point that not once in the poems is there so much as a suggestion that the selection of a husband or wife involved anybody other than the groom, his father and brothers, and the girl, her father, and brothers. The appearance even of brothers is not usual, and in any event that does not carry us outside the *oikos* to a broader *anchisteia.* Again the comparison with Africa is revealing. There the role of kin is indicated at once by the fact that frequently the marriage gifts were shared among the kinsmen, both in the giving and the receiving.[79] But never in Homer.

[76] See particularly Wolff, "Grundlagen," 1-8.

[77] For the political structure of the Homeric world, see Finley, *World of Odysseus,* Ch. 4; Roland Martin, *Recherches sur l'agora grecque* (Bibl. Éc. fr. Ath. et Rome 174; 1951), Part I; H. Jeanmaire, *Couroi et Courètes* (Lille, 1939), Ch. 1. It has been argued from such expressions as ἀναφανδὸν ὄπυιε in *Il.* 16.178, that a marriage "musste öffentlich geschehen, musste kundbar sein" (Köstler, "Raub- und Kaufehe," 225). Publicity was surely the custom —through the feast, I presume—but to take the further step of endowing it with a juristic quality is unwarranted.

[78] In this respect I am most nearly in agreement with Jeanmaire, *Couroi,* especially pp. 17-26, 97-111.

[79] See, e.g., I. Schapera, *Married Life in an African Tribe* (London, 1940), 82-92; M. Fortes, *The Web of Kinship among the Tallensi* (London, 1949), 272-73 and Index *s.v.* Brideprice; and for a general survey, Herskovits, *Economic Anthropology,* 174-77, 380-84.

It has been argued that the fact that Menelaus invited his neighbors and *etai* to the wedding-feast for Hermione demonstrates the tribal character of marriage.[80] However, the attendance of the *etai* as guests is no evidence that they played any role other than that of spectators. It would be as logical to argue from this passage that the neighbors also exercised some authority, for they are bracketed with the *etai*. And finally, it is by no means so certain as it appears in the lexica that *etai* means kinsmen.[81]

To be sure, I can cite no single passage which says clearly and unequivocally that the head of the household had the full power of decision. But there are signs pointing in that direction. The repeated phrase about leading or sending a woman to a man's *doma* is one. When Athena came to Sparta to warn Telemachus that he had better return at once, "for Penelope's father and brother are bidding her marry Eurymachus," the goddess concluded with the following generalization: "For you know what is the emotion in the breast of a woman, that she wishes to increase the household of him who weds her, and of her former children and of her dear husband she neither remembers once he is dead nor inquires."[82] The supremacy of the *oikos* over all other groups and ties could hardly have been stated more sharply. That was what marriage was as an institution, above all: the introduction of a mistress into the *oikos*. A man could have legitimate children by a slave woman—witness Menelaus' son Megapenthes, child of a slave, yet never called a νόθος, a bastard, but on the contrary, τηλύγετος, a favorite son.[83] But no man bought a *potnia*.

[80] *Od.* 4.3-16.

[81] I agree with Jeanmaire, *Couroi*, 105-107, that *etai* in fact refers to the members of a man's *compagnonage*, although I am not convinced by his further identification of the word with age-classes. Even Glotz, with his well-known emphasis on the tribal character of archaic Greek society, rejected the notion that *etai* were kin; see his *La Solidarité de la famille dans le droit criminel en Grèce* (Paris, 1904), 85-93.

[82] *Od.* 15.16-23.

[83] *Od.* 4.10-12. Although there was some distinction between legitimate

Perhaps we would have a better understanding of marriage law if we knew more about the significance of promises. There are four certain instances in the two poems of promises by a father to give his daughter in the future.[84] In two cases, the promise was fulfilled; in the other two, death intervened. Another kind of promise, that of Iphidamas to give additional *hedna* at a later date, was also blocked by death.[85] Hence we have no direct evidence from which to draw conclusions about the possible juristic significance of a promise to give in marriage and its enforceability. However, the whole pattern of relationships in the poems implies that such a promise had no great validity, especially since every instance we have was between outsiders; it could be enforced, if that word may be extended considerably, solely by personal power.[86] Perhaps the fact is worth noting, nevertheless, that a few such promises are actually recorded in the poems, as are quite a number of promises of gifts, whereas there is not one promise in the field of sales.

Two other important aspects of the law of marriage are even further beyond our reach for lack of evidence. The only reference to a divorce is an implied one. In his anger over the adultery of Aphrodite, Hephaestus said that he would demand the return of his *hedna*. Nothing more is made of this threat in the long, dramatic scene which follows, and it is

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and illegitimate children—witness the existence of the words γνήσιος and νόθος —it was not very sharp or often very important, and the power rested with the head of the household to recognize it or not, as he chose; see the summary of what little is known on the subject in Erdmann, *Ehe*, 363-68, 372-74; cf. Wolff, "Grundlagen," 27-28.

[84] Agamemnon to Achilles, *Il.* 9.144-48, 286-90; Priam to Othryoneus, *Il.* 13.363-69; Menelaus to the son of Achilles, *Od.* 4.6-7; Neleus to anyone who would drive off the cattle of Iphicles, *Od.* 11.288-92. I have excluded from consideration Patroclus' promise to the captive Briseis, *Il.* 9.297-99, and Odysseus' promise to his slaves, *Od.* 21.213-15 (cf. 14.61-64), neither of which adds anything to our understanding of the problem.

[85] *Il.* 11.244-45; cf. Hesiod, frag. 33 Rzach[2].

[86] Cf. Erdmann, *Ehe*, 206-207; and generally Gernet, "Droit et prédroit," Part I.

useless to seek any light there.[87] As for widowhood, the only instance apart from captives is that of Penelope. It would require another article as long as this one to examine in detail the confused and contradictory strands of the Penelope story, from which I have been unable to construct a consistent view of the status of widows.[88]

V

The problem which Koschaker presented as still unresolved, namely, to find the bridge between marriage by purchase and the later *engyesis,* thus disappears. In its place we have two other problems. One is the shift from the kind of marriage pattern I have drawn to marriage as a formal juristic act. That shift was merely one element in a much more general transformation, from an *oikos*-kinship world of status relations to the *polis* world of transactions consummated under the rule of law. The second is the shift from the practice of gift-giving by the prospective husband, with or without dowry in return, to the practice of gift-giving solely by the future father-in-law. That shift had its roots outside the realm of law altogether. It belongs to social history, and the explanation will depend on one's understanding of the basic social transformations of the eighth and seventh centuries B. C.[89]

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[87] *Od.* 8.317-59. I am not suggesting that return of the *hedna* may not have occurred under certain conditions (as it did in Africa; see the references in note 79), but that no conclusions may be drawn from the one remark of Hephaestus, otherwise unsupported. In this connection, cf. Erdmann, *Ehe,* 302-303, on the possibility that *Od.* 2.132-33 shows that a dowry was also to be returned in some cases.

[88] See the remarks in note 19.

[89] See generally Gernet, "Droit et prédroit," Part I. He considers the sixth to be the key century (pp. 30-31), whereas I should emphasize the seventh.

THE STONE THAT THE BUILDERS REJECTED: ADVENTURES OF SOME CIVIL LAW TEXTS

By H. F. Jolowicz *

FIRST let me explain my catchpenny title. It came into my head when I thought of the many instances in which a passage in the Corpus Juris Civilis originally of no particular significance had been brought out of its obscurity, constantly quoted, perhaps for purposes which its author would hardly have understood, and, it may be, made the basis for new and important doctrines. But I want to extend my topic also beyond such cases so as to include others in which subsequent interpretation of words in the Corpus Juris has been strikingly at variance with what we can believe to be the original meaning of the man who first wrote them.

I have no wish to argue here, even in the barest outline, the general theory of interpretation, how far in any real sense the intention of the legislator or legislature which passed an enactment either can be or should be taken into account in construing its words, and how far, once promulgated, these words should be taken, in the language of some German writers,[1] to have an independent capacity for life. However strange the idea of "independent life" may appear, we know that constructions which would have surprised the legislator are common enough in history. Early Roman *interpretatio*

* These pages are the substance of a lecture delivered by the late Regius Professor of Civil Law, Oxford, at a meeting of the Riccobono Seminar of Roman Law in America, Washington, D. C., on January 4, 1954. In the last letters written before his death, on December 19, 1954, the author indicated his intention to revise the paper in certain details. This wish now remains unfulfilled. The Editors of Seminar are deeply grateful to Mrs. Jolowicz and to J. A. Jolowicz, his son, for having made the manuscript ready for publication.

[1] E.g. Binding und Wach, cited Enneccerus, Kipp und Wolff, *Lehrbuch des bürgerlichen Rechts*, I (14th ed., 1952), 199.

of the XII Tables furnishes one example—and perhaps I am not too venturesome in saying that the great fabric of American Constitutional Law is another—but there are some peculiarities about the Corpus Juris, both as regards its original composition and as regards its treatment in subsequent history, that need some explanation before I come to specific examples of the manner in which it has been construed.

In the first place, the phrase "intention of the legislator," which, whatever our theoretical position, cannot be avoided when treating of construction, raises peculiar problems that do not arise in the construction of an ordinary statute or a modern codification.

The Corpus Juris is a statute, or rather a series of statutes, having been given the force of law by Justinian, an autocratic Emperor, who reigned from A. D. 527 to 565. It consists of four parts, of which three, the Institutes, Digest and Code, were compiled in the early years of the reign as part of a tidying-up process that we refer to roughly as codification. Each of these is introduced by an imperial proclamation giving it validity as a whole. The fourth part, the Novels, on the other hand, is not a single whole. It consists of enactments made by Justinian at intervals after the codification was supposed to be complete, and each one is a separate law with its own particular date and independent validity. But for our purpose at the moment this makes no difference. If, with respect to any part of the Corpus Juris, you asked in Justinian's day who was the legislator whose will was in question in any matter of construction, there could be only one answer—the Emperor Justinian. When, after the Dark Ages, Roman Law was revived in Western Europe, the answer might not seem so obvious, but it could not really be different because it was as the law of the Empire that the Corpus Juris claimed validity. To the medieval mind the Empire had never perished; it was continued in what we, for the sake of convenience, are accustomed to call the "Holy

Roman Empire." Thus when the Glossators, in the eleventh, twelfth, or thirteenth century, say that the former law was so-and-so, but that "today" it is different, they are referring not to Lombard or English or other barbarian systems, but to the latest stage of Justinian's legislation. Nor is the position of the interpreter different even much later, say in Germany in the eighteenth and nineteenth centuries. By no means the whole of the Corpus Juris was then regarded as having been "received" as law, but, in so far as it was received, the only relevant intention could be that of Justinian. Consequently Savigny, for example, writing in 1840, goes at some length into questions which arise on this basis. He lays down that—as is obvious—a later Novel repeals one of earlier date, or an enactment in the Code which conflicts with it; also—as is not so obvious—that an enactment in the Code repeals another also there, but of an earlier date; this is not so obvious because all enactments might be regarded as having been given equal validity by the introductory constitution (*Cordi nobis*). But in fact the preservation of the chronological order of the enactments in each title shows clearly that the earlier constitutions are in a number of cases only intended to show the history leading up to Justinian's own final arrangements.

Savigny will not however allow the same argument, that the later repeals the earlier enactment, to apply as between the Digest and the Code. If he did, the Code would always have to be given preference over the Digest, for the proclamation giving it validity was issued eleven months after that which introduced the Digest. But this, he says, was due to the accident that a revision of the Code was found necessary, and the version we have is the second edition, whereas there was no such revision in the case of the Digest. Clearly, in his opinion, the intention was that the two works should be regarded as a single whole.

But, secondly, there are difficulties about referring everything to Justinian's intentions. The greater part of his legis-

lation consists of words which were not his originally. The Digest is made up of extracts from classical authors, who had lived three hundred or more years before Justinian, and in the Code, though there are many of Justinian's own enactments, there are more that were originally promulgated by earlier emperors. No doubt it was he who made the words law in 533 or 534, but to understand what was originally written by the jurist Ulpian, about A. D. 210, or the Emperor Diocletian, about A. D. 300, we must clearly attempt in the first place to follow their line of thought. Often indeed the problem is complicated by the existence of interpolations. Of course it is the text as interpolated which has to be accepted, for that alone was given validity by Justinian, and if there is reason to think that Justinian's own compilers deliberately made the alteration, we have an unusually good piece of evidence regarding his intention. Even so, however, the double authorship frequently leads to obscurity because the Compilers were in a hurry and not very skilful. With pre-Justinianian interpolations the difficulty may be even greater.

Thirdly, as is already clear from what I have said, much of the Corpus Juris is not legislative in form. The Institutes are in the form of a lecture by the Emperor to his freshmen, and the material for them was mainly taken from classical manuals of instruction. The Digest was made up of legal literature of many different sorts. Some of it was expository, elementary or more advanced. Some consisted of monographs, or of commentaries on legislative texts, including specially the praetorian edict, or of commentaries on previous works. Most of it was casuist in treatment, i.e. it did not deal in abstract statement of principle, but with instances, though these were treated with very varying degrees of abstraction. Sometimes there might be a good deal of detail, including the names of the parties who had actually been concerned in some case; sometimes these became L. Titius and C. Maevius, the Roman equivalents of John Doe and Richard Roe; sometimes the writer has stripped the case of

all but what he considered the essential points. Even the Code, which consists of imperial enactments, is largely casuist, because it contains a great many judicial rescripts, i.e. answers given by the Emperor to petitioners (actual or potential litigants) who asked for his ruling on some point of law.

Obviously therefore the canons of construction which applied to straightforward legislation are not always suitable for interpreting the Corpus Juris, and to some extent the familiar problems of case law arise. Is the decision confined to the facts stated, or does it imply a wider principle, and if so how far does that wider principle go? Clearly the maxim that the inclusion of one thing by the legislator means the exclusion of all else, and the rule that *casus omissi* are not to be supplied, will not work in the same way as they do with ordinary statutes. In fact decisions can only be taken as legislative on the assumption that they embody a principle. A decision may have concerned a black cow, but in a system of case-law it will probably be taken as applying also to brown cows. On the other hand a statute which referred to black cows might well be taken as excluding brown ones by implication, and in some texts, rescripts especially, this argument *e contrario* does have to be used because the text has been interpolated in a peculiar way. A text originally said "You are not to do X"; somebody then altered it by saying "You are not to do X unless Y is the case", from which we can infer that if Y is the case then X is permissible.

Fourthly the very fact that the extracts, originally separate enactments or parts of distinct literary works, are put together in a single legislative document necessarily affects the construction which will be put upon them. No lawyer needs to be told how difficult it is to draft a codifying or consolidating statute without changing the law by the mere juxtaposition of the clauses. Deductions will be drawn from the combination of different passages whether the draftsman intended them to be read together or not, and this effect is magnified greatly in the construction of the Corpus Juris.

Its bulk is such that the original Compilers, in the comparatively short time allowed to them, could only have a limited appreciation of all that they included, and, though they tried to harmonize the different parts, they could only succeed to a limited extent in their task. There was thus considerable opportunity for unforeseen implications, and there is this further point. When the Glossators revived the study of Justinian's books in the eleventh century, they had very little in the way of tradition to help them. Such Roman law as had survived the Dark Ages was too debased, too greatly over-simplified to explain its complexities, and light on one passage could only be sought from other passages in the books themselves. What the original meaning had been thus often remained unknown. Also, though Justinian asserted that there were no contradictions in his compilations, this is not in fact true, and, as law cannot be allowed to be self-contradictory, later lawyers of all periods have been driven to forced interpretations in order to reconcile conflicting texts.

More important however than all this is the general medieval attitude towards all authoritative writings. It was the text that bound. As Sir Frederick Pollock puts it,[2]

> it was considered perfectly fair throughout the Middle Ages to apply any text of authority in any sense that it could be made to bear, without regard to what the original historical sense might have been. The more authoritative the text, the more applications were presumably to be discovered in it; and the most far-fetched use of a text is no proof that the writer had misunderstood its primary meaning.

One result of such an attitude is that a passage may, quite unconcernedly, be taken from the context in which it is found and transferred to some totally unrelated subject. Professor Coing has recently called attention to the use of this method in the *Consilia* of Bartolus,[3] and one example quoted [4] is this:

[2] "History of the Law of Nature," *Essays in the Law* (1922), 48.

[3] *Studi in memoria di Paolo Koschaker* (1953), I, 73-97.

[4] p. 78.

There is in the title of the Code dealing with testamentary trusts [5] a decision that if the testator has omitted the words "I wish" they can be supplied to complete the sense. From this it is deduced that if an insulting epithet is uttered, the words "You are" can similarly be supplied. But what is most striking is the apparently unscrupulous way, as it seems to us, in which he uses words referring to private matters to settle points of public, even of administrative law. But of course Bartolus was not really unscrupulous in the least; on the contrary, he was finding the right answer by reference to the very words of the authoritative text. Nor was he by any means alone in this practice. Some famous political slogans started life as private law texts, and I should like to take transferences from private to public law as the first type of my examples of strange interpretation.

Few texts have been bandied about more in political discussion than that which says, *Quod omnes tangit ab omnibus comprobetur.* It has a fine democratic flavor and has always been used to support the popular element in legislation as against such absolutist texts as *Quod principi placuit legis habet vigorem.* But when we look at its original context [6] we find that Justinian is simply laying down that if a boy has several guardians, and there is a proposal to do something which will put an end to the authority of all of them, such as letting the boy be adopted, all must give their consent. Even one of the best-known absolutist texts—*princeps legibus solutus*—is not quite so clearly a part of constitutional law as it appears if only those three words are quoted. When originally written by Ulpian [7] they referred not to any theory that the sovereign was above the law, but simply to his exemption from minor statutory restrictions, such as the disabilities imposed on unmarried persons with respect to the

[5] 6.42 *De fideicommissis* 10.

[6] C.5.59.5.2.

[7] Inscription: l.XIII. *ad legem Juliam et Papiam.*

receipt of legacies. And even as we have them in the Digest [8] they make a very different impression if we read the passage as a whole: "The emperor is not bound by statutes (*leges*—comitial laws); the empress is bound, but emperors usually allow her the same privileges as they themselves enjoy."

Another example of a private law text used for constitutional argument has the interest of some topicality. It concerns the so-called *clausula derogatoria*,[9] and the question is, "Can a testator bind himself in his will not to alter that will or not to alter it except in a particular way?" The text first says "no", which is in accordance with the statement elsewhere that a testator can change his mind up to the last moment of his life.[10] But it then goes on to qualify this answer in an obscure way which is no doubt due to interpolation, and can be taken to mean that only express revocation in a subsequent will may be regarded as overruling what was said in the first. Enough trouble has been caused by this obscurity in the law of succession, but still more results when for a testator you substitute a sovereign legislature and ask how far it can tie its own hands for the future, which is one of the questions involved in the constitutional disputes of South Africa to-day.[11]

Sometimes the transference of a text from one context to another, or more especially the generalization of one which originally dealt with a special topic, must have been foreseen and intended by the Compilers, as can be deduced from the place they assigned to it in the compilation. In general the arrangement of material in both the Digest and the Code is a traditional one, based on that of the commentaries on the praetorian edict. But this is not so throughout. Justinian for example departs from this order by devoting the first title in the Code to religious matters, and fittingly begins the

[8] 1.3.31.

[9] D.32.22.pr.

[10] D.34.4.4.

[11] D.32.69.pr. is sometimes similarly applied.

Digest with the heading "Of Justice and Law." In both Digest and Code there are titles dealing with what we should call "The Sources of Law"—in the Code, for instance, there is one on "*Leges,* Imperial Enactments and Edicts" [12] and one on Custom; [13] in the Digest there is one on "The Origin of Law and all Magistracies and on the Succession of Jurists," [14] which is our chief source for the history of juristic law altogether. These matters had been regarded as rather outside the sphere of the classical jurists, concerned as they were mainly with the detailed application of the private law, and belonging more to the sphere of the rhetoricians. The same is also true to a considerable extent of matters that concern the actual carrying on of a case in court,[15] in particular proofs and presumptions. Here again the Compilers, who were no doubt influenced by rhetorical theory, provided special titles, seeking the material where they could find it in the jurists' works and probably interpolating a good deal. Thus there is a title on "Witnesses" in both the Digest [16] and the Code,[17] as well as one on "Proofs and Presumptions" in the Digest.[18]

Still more important however, for our immediate point of view, is the famous last title in the Digest "On Various Maxims of the Ancient Law". If a text was put into this title, whatever its original context, the intention was clearly to make it a general rule, and sometimes the Compilers have themselves made it clear that they were generalizing by

[12] 1.14; cf. 1.15 (*De mandatis principum*) and 16 (*De senatus consultis*).

[13] 8.52.

[14] 1.2; cf. 1.3 (*De legibus senatusque consultis et longa consuetudine*), and 4 (*De constitutionibus principum*).

[15] Steinwenter, "Rhetorik und römischer Zivilprozess," *Zeitschrift der Savigny-Stiftung,* Rom. Abt., LXV (1947), 69-120.

[16] 22.5.

[17] 4.20.

[18] 22.3. See also D.34.5 (*De rebus dubiis*), especially 34.5.22—the rule relating to *commorientes.*

showing us the original context in some other title as well. Thus the phrase, *res iudicata pro veritate accipitur,* appears twice. Among the maxims just these words are quoted, and we know how misleading they are if taken as the statement of a completely general principle. But they are to be found also in the title on status,[19] where the whole passage runs: "We must include among free-born persons also one who has been pronounced (free-born) in a judgment, although (in fact) he was a freedman, because what has been judicially decided is taken as true." Here the scope of the words is limited by the context, and the meaning, as we should explain it, is probably that though a judgment is normally only conclusive as between parties, occasionally, as in such matters of status, it can also be effective against those who had nothing to do with the original litigation.

Even without a double record, it is often easy to see from the "inscription" what the original context of a maxim must have been: The rule, for instance, saying "He is guilty of damage who ordered it to be inflicted; no blame attaches to the man who had to obey,"[20] did not originate in a great criminal case in which some soldier pleaded "superior orders," but (pretty certainly) in the discussion of noxal actions. Could a master be made liable noxally, as well as on his own account, because of a delict which he had ordered his slave to commit? Opinions differed.

Frequently however the Compilers are quite innocent of the generalizing interpretation which has been placed on words that they included. I have already given the example of "What touches all alike . . .". Another is the text which became the stand-by of all who advocate the strict construction of statutes: *Quod quidem perquam durum est, sed ita lex scripta est.*[21] Not only when Ulpian wrote these words, but even where they still stand in the Digest, they refer to a very

[19] D.1.5.25.

[20] D.50.17.169.

[21] D.40.9.12.1.

special, and indeed very hard case, under the statute concerning adultery. In case of a divorce (which, remember, was an act of the party at Rome, not the result of a court decision) a woman was forbidden for a certain period to free any of her slaves, for fear that she might thus prevent their being put to the question if she were accused of adultery. And this, it was decided, applied even to those slaves who were far away from her, and whose evidence therefore could not be relevant.

An even stranger story attaches to the text which is usually quoted as authority for another well-known presumption, i.e. that a married woman's child was lawfully begotten—*pater est quem nuptiae demonstrant*. This was certainly never intended to have so general a meaning, either by the original writer (Paul) or by the Compilers. It appears neither in the "maxim" title, nor in that on presumptions, but in one which concerns the summoning of defendants into court. At Rome a man could not, without special permission, summon his father or his mother, and this is the context in which Paul said, to give his words in full: "A person's mother is always certain, even if he was born out of wedlock; his father is the man indicated by the marriage".[22]

It is perhaps also permissible to class under "generalization", or at least under transference from one topic to another, the strange use which was made of some texts in connection with custom as a source of law. It may be that classical lawyers would not have regarded custom as a source of law at all; in any case they did not, as we have seen, concern themselves much with such questions. The Compilers certainly did so regard it, but the medieval writers were even more interested, and they found the material collected in the Corpus Juris rather meagre. Custom, for instance, was spoken of as "long-enduring," but no text laid down how long it must have endured, or gave any indication of the number of instances of its observance required to show that it really existed.

[22] D.2.4.5.

As regards the first question indeed, in spite of the lack of direct authority, Glossators and Post-Glossators were fairly well agreed. Their view was, or commonly was, that ten years were needed to establish a custom, this being the normal period laid down in the Corpus Juris for the acquisition of title to land by "prescription of long time." It must not be thought on this account that the medieval lawyers were incapable of distinguishing custom from prescription; their argument was justified on the ground of analogy and because, if "long" meant "ten years" in the one case, the same meaning must also be given to it in the other. A few writers, on similar lines, argued for a hundred years, because custom is called age-old in one passage of the Code [23] and a hundred years is said elsewhere to be the span of an "age-old" man's life.[24]

On the second point there was less unanimity, but it was held by many that two instances of observance were enough to show the existence of a custom, and this view was supported by a truly marvellous interpretation of an enactment in the Code.[25] The Emperor Gratian in A. D. 385 granted a general pardon at Easter, but excepted from its operation some particularly atrocious criminals, and also those who had offended a second time, because, he said, if they were included, the imperial clemency might appear to be granted on account of their "custom"—i.e. of offending—rather than to encourage them to reform. This was, of course, pure rhetoric, or, if you prefer, a grim sort of witticism, but a certain crazy logic can deduce from it that, according to the Emperor, two instances, the original crime and its repetition, make a custom. And this view can be bolstered up by reference to another text, torn from its context in the title on witnesses,[26] which says that a requirement expressed in the

[23] *Longaeva* C.8.52.2.

[24] D.7.1.56.

[25] C.1.4.3.4. A.D. 385.

[26] D.22.5.12.

plural is satisfied by the number two.[27] Later civilians discarded this argument, which looks to us like a wilful perversion, but the decision itself, however reached, was sensible enough when it was made. In the Middle Ages new practices were pressing for recognition and custom was not so sharply distinguished as it is today from legislation, for legislation often took the form of amending or confirming custom. As Professor Plucknett puts it,[28] it was "living custom" that was in question, and we must beware of importing into medieval discussions the modern idea that custom is necessarily immemorial and immutable.

Here indeed, as so often, it was a new and urgent problem that gave occasion for the captious interpretations.

Another well-known field in which this occurs is that of "Private International Law". Something like a system of "Private International Law" had perhaps existed in the time of the Roman Republic and of the Early Empire. Not all Rome's subjects were then her citizens and some of them had their own systems of law, which might lead to "conflicts" that required solution. We know little as yet about the way in which solutions were found, but the difficulties were certainly diminished by the conception of the *ius gentium* as a law applicable to all free men, whatever their nationality. In Justinian's time the difficulties were no longer there. All free inhabitants of the Empire were citizens, and there was very little peaceful intercourse with people outside that required regulating by law. No relevant texts therefore, if indeed any were available, were incorporated in the Corpus Juris.

The problem however presented itself again in the Middle Ages in the guise of conflicts between the "statutes" of the Italian city-states, and a solution had to be sought. It was found especially in texts which originally dealt with a different subject—the assignment of persons to particular districts

[27] *Pluralis enim elocutio duorum numero contenta est.*

[28] *Legislation of Edward I* (1949), 6.

not for the purpose of applying a special law to them (for in theory the law was the same everywhere), but for other purposes, especially that of jurisdiction. It was a truly Roman conception that each man had his *forum,* i.e. the place where he should normally be sued if any action had to be brought against him. It was in this connection that the idea of " domicile ", destined for so splendid a career in " Private International Law," was developed. But even so, some of the texts needed a good deal of imagination before they could be made to yield anything to the purpose. Thus the idea of a " matrimonial domicile " is largely based on a passage which does indeed use the phrase, but in an entirely non-technical fashion,[29] and another text, commonly quoted in support of the view that a wife takes her husband's domicile, really implies little more than that a woman is likely to live with her fiancé when she becomes his wife.[30] Better reasoning is perhaps displayed in the use of an enactment in the Code to support the rule that the formalities of a legal act are regulated by the law of the place where it is carried out—the *lex loci celebrationis.* But the argument is of the *e contrario* type to which I have referred, for what the emperor says (or is represented as saying) to the petitioner is this: " Unless there is a special rule in your home whereby the formalities are relaxed, and the witnesses did not perform their office in the presence of the testator, the will is not valid." [31] From this it would seem permissible to infer that if there had been a local rule relaxing the formalities of will-making, it would have applied, but this is an inference only, and Savigny did not agree that it was a legitimate one.[32]

A different sort of case in which the solution of a problem has been helped by an argument *e contrario* from a single

[29] D.23.2.5.

[30] D.5.1.65.

[31] C.6.23.9.

[32] *System des heutigen Römischen Rechts* VIII (1849) § 382, p. 360.

passage, can be found in the law of what I believe is usually called in the United States "Restitution".

Anyone who has glanced at the French law on the subject will have discovered that the Civil Code itself, unlike some more modern codes, contains no general rule ordering the restitution of unjustifiable enrichment, but that the courts have gone a long way, if not the whole way, to supplying the omission. He will also have learnt that the name generally given to the action by which the enrichment is reclaimed is *actio de in rem verso,* and that this name is equally generally deplored. From the point of view of legal history the name is indeed objectionable. The *actio de in rem verso* of the Roman law, literally "action for what has been paid to a person's advantage", concerned only a very special case. In principle no action lay against a father or master on the contract of his son or slave, but there were exceptional cases in which praetorian action was granted, and this was one. If the proceeds of the contract had been used to the advantage of the father or master, the amount by which he had profited could be claimed. One passage in the Code however goes further and, by implication, allows an action against the party benefiting, although the person who made the contract was independent (not a son or slave), and was not treated as an agent. The text, which has been rendered obscure by interpolation, runs roughly like this: "If you have contracted with an independent person, A, who was acting in the interest of B, and have looked to A as the party to the contract, you cannot bring an action against B, unless the money was paid to his advantage"; [33] it is thus implied that if it was paid to his advantage, you can bring an action against him.

Even this text, it will be seen, falls considerably short of giving a general action for restitution, but it received extensive interpretation, and the action based on it, generally known as the *actio de in rem verso utilis,* i.e. action on the analogy of that properly so called, accounts for the curious

[33] Diocl. C.4.26.7.

name of the French remedy, though this interpretation of an obscure text is, of course, far from being the only reason why the law developed as it did in France.

Just one more example: In the Digest title on the rescission of transactions entered into for the purpose of defrauding creditors [34] the following words are quoted from Ulpian:

> If a person who is indebted to me and several others makes off carrying money with him, and I, having caught up with him, take what is owing to me off him, Julian's view has prevailed, i.e. that it makes a great deal of difference whether this happens before or after the creditors have been put in possession of his goods (i.e. roughly, before bankruptcy proceedings have begun). If before, the action *in factum* does not lie; if after, it does.

Prima facie this concerns only the relation of the creditors *inter se*. If one steals a march on the others by securing payment in this way, can the others get the payment rescinded or can they not? It depends, says Julian, whether bankruptcy proceedings against the insolvent debtor have been initiated or not.

Not, one would think, a particularly striking decision, or one that would be of interest outside the original topic of bankruptcy. But in fact it is cited over and over again, and in connection with a different topic—that of self-redress or self-help. And the reason is this: in contrast to Germanic systems which allowed self-redress fairly freely—distress for rent and distress damage feasant are familiar examples in English law—the Roman system allowed it only rarely. There are in fact only quite a few exceptions to the general rule that a person may not himself use force to insist upon his rights, but must get help from the public authorities.

The post-Roman jurists therefore seized upon this text, not for its main point, but because, by implication, it appeared to justify the violent act of a creditor who takes money

[34] D.42.8.10.16.

from his absconding debtor, and thus furnished support for a doctrine of "necessity", i.e. that self-redress is permissible if irreparable loss would be suffered by waiting until state assistance could be invoked.

A lot of nonsense has, I think, been talked about fundamental differences in spirit between Roman and Germanic law. Much, I believe, is due not to fundamental antagonisms, but to chance. But there are differences, and this is one of them. To the later interpreter it seemed outrageous that a creditor should be forced to allow his debtor to escape merely because he could not invoke the aid of the state in time to stop him, and this text was seized on because it seemed to support a juster rule.

The lawyer in fact is always between the devil and the deep sea. On the one hand he must not allow authority to lead him into injustice; on the other hand he must not give his decision arbitrarily, without authority, merely because it seems just to him at the moment. Hence his use of legal texts, which sometimes seems so reprehensible to the layman, and hence also sometimes his use of humble material to become the head stone of the corner of his edifice.

THE PUBLIC POLICY EXCEPTION IN PRIVATE INTERNATIONAL LAW: A REAPPRAISAL IN THE LIGHT OF LEGAL PHILOSOPHY

I FEEL that I owe a word of explanation to the members of this Seminar for the selection of a topic which has little connection with Roman Law. Concentration on the various subjects which I am teaching in Salt Lake City has recently kept me from close contact with the Roman Law, so that I thought it more appropriate to speak on a theme which is more directly related to my present interests. I chose the subject of the public policy exception in private international law because I have lately become much intrigued with some of the philosophical implications of Conflict of Laws problems. I believe that the jurisprudential side of Conflicts has not always received the attention which it deserves, and that the interrelation between legal philosophy and private international law offers a fruitful theme for future exploration.

To return to the Roman Law for a brief glance, it must be said that the guidance and enlightenment which the great Roman jurists have bestowed on us in so many areas of private law fail us almost completely in the domain of Conflicts. Although there are some references to non-Roman laws in Gaius' Institutes,[1] and although Justinian's *Corpus Juris* contains some passages which might be said to deal with problems of a Conflicts character,[2] there is no theory of choice

* This paper is a slightly revised version of the magisterial address delivered by the author at a meeting of the Riccobono Seminar for Roman Law held in Washington on December 17, 1954.

[1] See H. Lewald, "Conflits de lois dans le monde grec et romain," 13 *Archeion Idiotikou Dikaiou* 28 (1946).

[2] These passages are collected in J. H. Beale, *Conflict of Laws* (1935), Vol. 3, Sec. 1882.

of laws to be found in the writings of the Roman jurists, nor any elaboration of possible general approaches to this complicated subject. This is the more surprising as the phenomenon of a collision of legal systems was by no means a merely academic matter for the Roman lawyers. It is well known today that the Romans never forced their own law in a wholesale fashion upon all subjects of the Roman Empire, and that this empire, like the British Commonwealth of Nations, permitted the existence of a plurality of legal systems in the field of private law. Before 212 A. D., Roman law remained a privilege for Roman citizens and the provincials were governed by local laws, unless the special conditions for the application of the *jus gentium* were present. But even after the *Constitutio Antoniniana,* which conferred Roman citizenship upon the inhabitants of the provinces, the local law persisted to a considerable extent in the Eastern provinces of the far-flung Empire. Discoveries of papyri made in Egypt during the last few decades have thrown light on many legal problems which arose as a consequence of the co-existence of Roman Law and Hellenistic local law in that province of Rome, and we are today in the possession of many materials which were not available to Ludwig Mitteis when he wrote his trail-blazing work entitled "Imperial Law and Indigenous Law in the Eastern Provinces of the Roman Empire." [3] There were certain types of cases in which the Roman courts applied the local law, and others in which they declined to give recognition to the Hellenistic law.[4] Many details are still controversial. Whatever conclusions of a general character may be drawn for ancient Conflicts law from these case materials would hardly suffice to piece together or reconstruct a Roman theory of Conflicts.

[3] L. Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des Römischen Kaiserreichs* (Leipzig, 1891).

[4] See R. Taubenschlag, "The Roman Authorities and the Local Law in Egypt," 5 *Journal of Juristic Papyrology* 121-141 (1951); V. Arangio-Ruiz, "L'application du droit romain en Egypte après la Constitution Antoninienne," 29 *Bull. de l'Institut d'Egypte* 83-130 (1946).

In order to study the foundations for this branch of the law we must turn to sources of a much more recent vintage. Three great jurists of the 19th century have laid the cornerstones for the modern development of private international law in the Civil Law and Common Law orbits, and these three writers have also provided us with theoretical justifications for the particular doctrine of Conflicts law which I wish to discuss tonight. These three jurists are Friedrich Carl von Savigny, a German law professor, Joseph Story, an American judge, and Pasquale Mancini, an Italian political leader. The three men, as I shall try to show, approached our subject from quite different suppositions and premises, with the result that their proposals for specific solutions, in many instances, turned out not to be in harmony with each other.

Savigny, in his monumental "System of Contemporary Roman Law", proposed to predicate private international law on the idea of an international community of nations having intercourse with one another. He attributed the validity of this idea in part to the influence of a common Christian morality and in part to the well-considered self-interest of nations.[5] The postulate which he derived from this basic conception for the law of Conflicts was that "for each legal relationship that national law be ascertained to which this legal relationship, according to its peculiar nature, is pertaining or subject."[6]

[5] F. C. von Savigny, *System des heutigen Römischen Rechts*, Vol. 8 (Berlin, 1849), p. 27. Compare his view of the international community with that of Suarez, as quoted by J. B. Scott in "Suarez—His Philosophy of Law and Sanctions," 22 *Geo. L. J.* 405, at 461 (1934): "Therefore, although a given sovereign state, commonwealth, or kingdom, may constitute a perfect community in itself, consisting of its own members, nevertheless, each one of these states is also, in a certain sense, and viewed in relation to the human race, a member of that universal society; for never are these states, when standing alone, so self-sufficient that they do not require some mutual assistance, association and intercourse, at times for their greater welfare and advantage, but at other times because also of some moral necessity or lack, as is clear from experience."

[6] *id.* p. 28. Savigny maintained that this cardinal principle should not be regarded as a manifestation of international "comity," flowing from the

Savigny pointed out, however, that this general principle requires restrictions in view of the existence of certain municipal laws which do not countenance such a broad-minded conception of the legal relations between nations. Every nation, he said, possesses enactments of a fundamental and compulsory character which must be held to override foreign laws which would be applicable under ordinary choice-of-law principles. Such laws, in his opinion, are either expressions of certain basic moral value judgments (such as laws prohibiting plural marriages) or statutes designed to protect the public good of the community (*publica utilitas*) in matters relating to the political order, the police power, or the economic welfare. Savigny also maintained that no state was under an obligation to give recognition to legal institutions of another country which are entirely unknown to its own legal system, such as slavery or civil death.[7] We find in these passages an early formulation of the doctrine of public policy or *ordre public*. Savigny made it clear, however, that he regarded the doctrine as an *exception* from general principles of Conflicts law, whose boundaries should be strictly observed, and he gave voice to the expectation that the natural evolution of nations would result in a continual decrease of the instances in which this exception would be applied.[8]

It was one of the little historical pranks played by Clio, the muse, that this cosmopolitan approach to private international law was fathered by the author of the "Volksgeist" theory of law, a highly nationalistic view according to which all law must be regarded as the expression of the particular "spirit" of a nation or people.[9] The apparent contradiction

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generosity or capricious fancy of nations, but as a genuine concomitant of progress and legal evolution.

[7] *id.* pp. 32-38.

[8] *id.* pp. 32, 38. Savigny characterized the delineation of the boundaries of the exception as "perhaps the most difficult task" in this area of private international law.

[9] See F. C. von Savigny, *On the Vocation of our Age for Legislation and Jurisprudence*, transl. by A. Hayward (London, 1831), pp. 24 *et seq.*

can perhaps be resolved if we recognize that a nationalistic interpretation of law is quite compatible with the notion of an international equality of sovereign nations entering into mutual relations. Savigny's doctrine of Conflicts law would not be reconcilable with the "master race" version of the nationalistic view which rejects the idea of an equality of nations; however, his philosophy was free from any racial ideology.

When we turn to the work of Judge Joseph Story, the second founder of the modern science of private international law, we encounter a similar contradiction in doctrinal attitude as in the case of Savigny, but this time the prefixes are reversed. In his general theory of law, Story was a protagonist of the classical law-of-nature philosophy, which proceeds from the assumption that all men possess certain inherent and inalienable rights which have validity everywhere and at all times. He wrote a famous opinion on international law in the case of the Schooner *La Jeune Eugenie,*[10] in which he took the view that a general world-wide trend toward the abolition of slave trade could be enforced by the courts as a form of "natural law", at least against those nations which had by their official declarations and policies shown sympathy with the trend.[11] It cannot be said, however, that a similar universalist spirit permeates his book on Conflicts, which has exercised a strong influence on American developments in this field of the law. In this work, Judge Story adheres to a rather narrow theory of national sovereignty which regards any deference to a foreign legal system as an expression of courtesy or discretion rather than of principle or right.

> It is an essential attribute of every sovereignty that it has no admitted superior, and that it gives the supreme law within its

[10] *U. S. v. The Schooner La Jeune Eugenie*, 2 Mason 409 (1822).

[11] The reasoning of the case suggests the interesting query as to the extent to which non-formalized social trends or currents may be regarded as sources of law. See on this point Justice Frankfurter in *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 497 (1951).

> own dominions on all subjects appertaining to its sovereignty. What it yields, it is its own choice to yield; and it cannot be commanded by another to yield it as a matter of right.[12]

Even if you assume, Story said, that a moral duty exists sometimes to give effect to foreign laws, it is a moral duty of "imperfect" obligation, on a par with the obligation to be beneficent or charitable. Every nation, he maintained, must be the final judge for itself, not only of the nature and extent of that duty, but of the occasions on which its exercise may be justly demanded.[13] Insofar as recognition is given to the laws of a nation outside of its own territory, such recognition is based altogether on the voluntary consent of the recognizing nation; and it is inadmissible when it is contrary to the "known policy" of that nation, or prejudicial to its interests.[14] While the examples given by Story of instances where "comity" towards another nation should be withheld by the courts of a state are by no means extreme, his general formulae are quite apt to encourage a wide use of the public policy exception.

Again, it would appear that there are good reasons which explain the seeming discrepancies between Story's general attitude toward law on the one hand and his doctrine of Conflicts on the other. Story had borrowed his "comity" theory from certain Dutch writers of the seventeenth century who had proclaimed it at a time when Holland was still flushed with jubilation over its newly-won independence from the Spanish Empire. Perhaps Story's enthusiasm for unlimited national sovereignty stemmed from the fact that the United States not so long ago had gone through a similar experience of freeing itself from dependency on another nation. Furthermore, he may have harbored suspicions against foreign countries which had not come as close to the realization of his

[12] J. Story, *Commentaries on the Conflict of Laws*, 6th ed. (Boston, 1865), Sec. 8.

[13] *id.* Sec. 33.

[14] *id.* Sec. 38.

individualistic natural-law philosophy as his own nation, desiring for that reason to give to his country the right to be selective in the recognition of foreign rules of law. Finally, it might also be observed that Judge Story was a child of two epochs. With one foot he stood in the eighteenth century, the great age of cosmopolitan individualism and universal rationalism in political philosophy. With the other, he trod on nineteenth-century ground and was aware of the irresistible rise of nationalism and the firm assertion of unlimited sovereignty by the nations of the world.

A few words should be said about Pasquale Mancini, who must also be regarded as one of the fathers of modern private international law. In a famous speech delivered at the University of Turin in 1851 on "Nationality as the Basis of the Law of Nations," [15] Mancini defended the thesis that private law is in its nature personal and not territorial; a person should therefore be accompanied by his national law wherever he goes. On the other hand, he argued, there exist many rules of *public law* in every state which serve to guarantee the public order and social structure of the country, and which by their very nature must claim a territorial scope. These rules, he maintained, should be applicable to all persons within the territory, regardless of their nationality and regardless of whether or not their own national legal system had adopted the same solution. By thus connecting the concept of the *ordre public* with the principle of territoriality, Mancini stripped the *ordre public* of its nature as an exception from ordinary principles of Conflict of Laws and thereby paved the way for an excessive enlargement of its field of operation.[16]

The views of Mancini have significantly influenced the judicial practice in Italy, France, and other Romanic coun-

[15] Reprinted in P. S. Mancini, *Diritto Internazionale, Prelezioni* (Naples, 1873), p. 5 *et seq.*

[16] On Mancini see G. Husserl, "Public Policy and Ordre Public," 25 *Va. L. Rev.* 37, 59 *et seq.* (1938); E. G. Lorenzen, "Story's Commentaries on the Conflict of Laws," 48 *Harv. L. Rev.* 15, 32 (1934); M. Wolff, *Private International Law*, 2d ed. (Oxford, 1950), pp. 38-40.

tries. Story's work on Conflicts has furnished the guiding star for many American court decisions, especially during the formative period of this branch of the law. Savigny's treatment of the field has had a strong impact on the German legal development. The net result of these influences has been that German court decisions in the field of private international law have made a comparatively moderate use of the public policy doctrine, while the attitude of the judiciary in the Romanic world and, to a lesser extent, in the United States, has been less liberal and has often approached rather extreme forms of parochialism.

The self-restraint of the German courts in the use of the public policy exception is not due to statutory mandate. On the contrary, the German statute defining the exception is very broad and might have served as the basis for an expansive interpretation of the principle. The statute reads as follows:

> A foreign law shall not be applied if its application would be *contra bonos mores* or would violate the purpose of a German law.[17]

The words "purpose of a German law," if taken literally, could easily be construed as giving the German judiciary blanket power to deny application to almost any foreign legal source which differs from the German law. Every law has the "purpose" of regulating a certain legal question in a fashion considered superior to possible alternative solutions of the problem. Thus, the judge, in many Conflicts cases, would be logically justified in taking the position that the purpose of the foreign law differs from the purpose of the German law, and that the statute compels him to give preference to the latter. However, the German Reichsgericht, perhaps under the influence of Savigny, has refused to sanction a construction of the provision which would amount to a practical nullification of private international law. In an

[17] German Civil Code (Introductory Law), Art. 30; see also M. Wolff, *Das Internationale Privatrecht Deutschlands*, 3rd ed. (Berlin, 1954), p. 63.

interesting exemplification of what might be called "judicial legislation" in a Civil Law country, the court has held that the public policy exception should prevail only "where the difference between the political and social conceptions on which the German and foreign law respectively rest, is so substantial that the application of the foreign law would directly threaten the foundations of the German political and economic life." [18] Stripped to its bare bones, this statement means that reliance on "public policy" should be merely a safety valve in cases of an exorbitant discrepancy between German and foreign notions of law.

In practice, the German courts have not always observed the restraint which the above formula was designed to enjoin upon them.[19] Thus, in a case where a foreign code contained no statute of limitations barring certain types of contractual claims, the absence of a period of limitations was held by the Reichsgericht to be inconsistent with a fundamental and inalterable principle of German law.[20] But apart from this and a few other questionable applications of the formula, German courts cannot be accused of having carried the public policy doctrine to extremes. The same observation holds true for Swiss practice.[21]

France, on the other hand, has generally adhered to the doctrines of Mancini and has viewed the "ordre publique" as a cardinal principle of private international law rather than an exception from ordinary choice-of-law rules. Far from permitting only "massive" dissonances between its own and other legal systems to stand in the way of the enforcement of a foreign legal rule, French courts have given a

[18] *Entscheidungen des Reichsgerichts in Zivilsachen* 60, 300; 63, 19; 93, 183; 110, 175; see also Wolff, *op. cit.* n. 17, p. 63; G. Melchior, *Die Grundlagen des Deutschen Internationalen Privatrechts* (Berlin, 1932), p. 341.

[19] See the examples given by F. Kahn, *Abhandlungen zum Internationalen Privatrecht*, Vol. I (München and Berlin, 1928), p. 168 *et seq.*

[20] *Entscheidungen des Reichsgerichts in Zivilsachen*, 106, 82.

[21] See M. Gutzwiller, "Der Ordre Public im Schweizerischen Internationalprivatrecht," reprinted from *Mélanges Streit* (Athens, 1939).

systematic and deliberate preference to their national legal institutions wherever any element of "public interest" could be found to exist in the situation.[22] Thus, French courts have refused to recognize chattel mortgages created abroad, because French law prohibits such mortgages. They have nullified title to goods acquired validly abroad, on the ground that such title could not have been secured legally in France under its anti-monopoly laws.[23] In a case where a French court in Belfort was bound to apply German law as the national law of the defendant, it refused to give recognition to the German rule that a son-in-law is not legally obligated to support his father-in-law, in the face of a contrary rule of the French law which was considered to be an inabrogable expression of public policy.[24] Such examples could be multiplied.

In the United States, it is more difficult than either in Germany or France to ascertain a clearly defined pattern in the adjudication of cases involving the public policy doctrine. In the words of Chancellor Nutting of the University of Pittsburgh,

> We know enough to say with considerable confidence that an investigation to determine when the courts will apply the doctrine of public policy to deny the recognition of a foreign right would result in the conclusion, "You never can tell." [25]

Even the decisions of single courts, such as the important New York Court of Appeals, sometimes manifest strange

[22] J. P. Niboyet, *Traité de Droit international privé*, Vol. 3 (Paris, 1944), p. 496, in giving his approval to this practice, states that "the ideal of legislative world evolution is not 'parler universel' but 'parler terroir' or more precisely 'parler français' (to speak French)."

[23] For these and other examples see M. Wolff, *op. cit. supra* n. 17, p. 62; H. Lewald, *Règles générales des conflits de lois* (Paris, 1939), p. 120; J. P. Niboyet, *Manuel de Droit international privé*, 2d ed. (Paris, 1928), pp. 552 *et seq.*

[24] Kuntz v. Ka-Kuntz, Trib. civ. Belfort (Dec. 9, 1923) 51 *Journal du Droit international privé* [*Clunet*] 713 (1924).

[25] C. B. Nutting, "Suggested Limitations of the Public Policy Doctrine," 19 *Minn. L. Rev.* 196, 200 (1935).

vacillations in their approach to the problem. In the case of *Loucks v. Standard Oil Company of New York*,[26] that Court was willing to enforce a Massachusetts statute which proportioned damages to the guilt of the offender in cases of wrongful death caused by another's negligence. New York did not have a statute of this kind, but this fact was considered to be no bar to the recognition of the damage claim. "If a foreign statute gives the right," said Mr. Justice Cardozo, "the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home." Only a cause of action which in its nature "offends our sense of justice or menaces the public welfare" was held by him to be embraced within the public policy exception.

This case was decided in 1918. Eighteen years later the Court, through the mouth of Judge Lehman, enunciated an entirely different conception of "public policy." In *Mertz v. Mertz*,[27] a law of Connecticut permitting a wife to sue her husband for personal injuries caused by his negligence was denied recognition in the New York forum. This was not done for the conceivably valid reason that authorization of such suits might endanger the domestic peace and tranquillity and offend against the idea of the family. That argument was not advanced by the Court because the statute obviously represented a legislative recognition of the widespread existence of liability insurance in modern society. (In fact, the legislature of New York adopted a similar statute shortly after the decision in *Mertz v. Mertz*.) The majority of the judges denied recovery on the basis of a definition of public policy which bears little resemblance to the formula suggested by Judge Cardozo in the *Loucks* case. The *Mertz* definition reads as follows: "When we speak of the public policy of the state, we mean the law of the state whether

[26] 224 N. Y. 99, 120 N. E. 198 (1918).

[27] 271 N. Y. 466, 3 N. E. 2d 597 (1936).

found in the Constitution, the statutes, or judicial records." This definition, propounded by the highest court of a state which experiences more contacts with foreign legal systems than any other state in the Union, goes far beyond anything that Story or Mancini would have included within the range of the public policy notion. Carried to its ultimate consequences, the formula would signify that the forum must always apply its own law.

The same court, speaking through the same judge, decided in *Herzog v. Stern*[28] that the state of New York could not enforce a Virginia statute providing that a cause of action in tort shall not abate by the death of the wrongdoer. The decision was placed on two grounds: first, that this type of action was unknown under New York law and, secondly, that it was repugnant to the public policy of the state, since New York adhered to the ancient common law rule excluding survival of tort actions. While this is perhaps one of the more extreme cases, many examples could be given of a similar attitude taken by the courts of other states.[29]

Such undue extensions of the public policy concept must in part be ascribed to Story's notion of "comity," which has shaped the thinking of many American judges. Thus in *Flagg v. Baldwin*,[30] the Court of Errors and Appeals of New Jersey, in refusing to recognize a wagering agreement validly contracted under the laws of New York, made the following statement:

> The enforcement of a foreign law and contracts dependent thereon for validity, within another jurisdiction and by the courts of another nation, is not to be demanded as a matter of strict right. It is permitted, if at all, *only from the comity which exists between states and nations.* (Italics supplied.)

[28] 264 N. Y. 379, 191 N. E. 23 (1934).

[29] For examples see E. Rabel, *The Conflict of Laws*, Vol. 2 (Chicago, 1947), pp. 568 *et seq.*

[30] 38 N. J. Eq. 219, 48 Am. Rep. 308 (1884).

But since in nine out of ten cases the government of the sister state or foreign country will never learn of the pendency of an action between two private parties in the courts of another state, it can safely be assumed, in most instances, that the sensibilities of that government will not be too much offended if the law of the forum is applied in preference to its own.

It would seem to be quite unsound to seek the roots of Conflicts law in the little vanities and susceptibilities of states or governments. The justification for the existence of this branch of the law rests on entirely different considerations, as writers like Robert Neuner, Max Rheinstein, G. C. Cheshire, and Herbert Goodrich have shown. It would be a denial of essential justice to hold that a *bona fide* transaction consummated by the parties within a certain state and presumably with a view to the laws of that state should, by the intervention of a more or less adventitious foreign forum, suddenly be controlled by a legal system which the parties could not have expected to become the governing law of the transaction.[31] Many of the fundamental rules of private international law are in fact based on this simple notion of justice and fair-dealing, a notion similar in character to that which underlies the rule against *ex post facto* laws.

Once this basic premise is conceded, a certain shift in our attitude toward Conflicts problems must necessarily follow. As Heinrich Kronstein pointed out in his article on "The Crisis of Conflict of Laws",[32] a major reorientation in this field in the direction of a greater materialization of the aims of justice is urgently needed today. Such a reorientation is, in my opinion, particularly imperative in regard to the administration of the public policy exception.

[31] See R. Neuner, "Policy Considerations in the Conflict of Laws," 20 *Can. Bar Rev.* 479, 482 (1942); M. Rheinstein, "The Place of Wrong: A Study in the Method of Case Law," 19 *Tul. L. Rev.* 4, 165 (1944); G. C. Cheshire, *Private International Law*, 3rd ed. (Oxford, 1949), pp. 4-5; H. F. Goodrich, *Handbook of the Conflicts of Law*, 3rd ed. (St. Paul, 1949), p. 7.

[32] 37 *Geo L. J.* 483, 511 (1949).

I would like to suggest that the perplexing confusion which today marks the application of this exception in judicial practice has its basic roots in an overestimation of the *order* function of law and an insufficient appreciation of the role which *justice* plays in the administration of the law. If we regard law exclusively as a device for imposing some form of order upon a given society, we are bound to look rather helplessly for choice-of-law criteria and standards of evaluation in situations where one order of laws comes into collision with another legal order. All commands of the sovereign, whatever their contents may be, will then appear to us to be of nearly equal weight in the task of ordering human relations; and distinctions between regulations which are required in the interest of essential justice, on the one hand, and norms which merely represent an accidental or historically-conditioned choice between several alternatives, on the other, will be found to be devoid of legal significance. Such an attitude will logically end in a judicial nihilism which regards *any* statutory enactment as an expression of the public policy of the state which, as a manifestation of sovereign will, should in all cases be entitled to exclusive application in the territory in which such sovereign will reigns supreme.

A discriminating attitude toward the public policy problem can, in my opinion, be gained only if we move away from Lorenzen's suggestion that no theory of Conflicts law can be acceptable to Anglo-American jurisprudence which is not anchored in the notion of absolute sovereignty based on physical force.[33] This idea, which embodies the negative part of Judge Story's heritage, should be abandoned in an age in which international contacts and interpenetrations of legal systems are due to multiply. If we tend towards the position that a legal solution adopted by a state or country is wrong because it differs from the one accepted at home, we are apt

[33] E. G. Lorenzen, "Story's Commentaries on the Conflict of Laws," 48 *Harv. L. Rev.* 15, 36 (1934).

to foster parochialism in law with its attendant prejudices and suspicions.

The approach here suggested does not by any means imply or necessitate abandonment of the *ordre public* notion in private international law. As long as there are " two worlds " ruled by fundamentally divergent policies and value concepts, we cannot dispense with the public policy weapon, because we do not want other states to force us into sanctioning institutions or principles which are utterly distasteful to us. We wish to retain our freedom to repudiate acts of other states which seem opprobrious or even criminal to us. For instance, we may wish to keep a free hand in denying the extraterritorial validity of expropriations that were made in disregard of fundamental canons of fairness, or of laws which deprive minority groups of elemental human rights.

Apart from such instances of policies offending our deepest sense of justice, however, we should be conscious of the relativity of many aspects of the *ordre public* and should strive to become tolerant of differences between legal systems, even though they may appear quite far-reaching and substantial to us. One of the tasks which a practically-oriented " natural law " philosophy of the future might be assigned to perform is to help us draw a line of demarcation—insofar as it can be done—between those features of a legal system which are merely fortuitous or conditioned by history or national tradition and those principles of law which we deem indispensable to civilized ways of social existence.[34] Inasmuch as our jurists

[34] As a preliminary working tool, the definition offered by the Swiss Federal Court in *Allgemeine Elektrizitätsgesellschaft v. Journaliag*, BGE 64 II 88, 97-98 (1938) would appear to be quite acceptable: "If the nature of *ordre public* cannot be defined in a general and comprehensive fashion, it is nevertheless possible to delimit with some precision the function which has devolved upon it: in cases where foreign law should, on principle, be applied, *ordre public* insures the application of a rule of local law or prevents the application of a rule of foreign law when the sense of justice of the forum

and judges seem desperately in need of the formulation of standards and criteria which can at least illuminate the goals and objectives to be pursued in this sector of the law, the carrying out of this task might prove to be not only stimulating to the speculative mind but of real service and benefit to the judiciary and the legal profession.

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would otherwise be outraged." See R. B. Schlesinger, *Comparative Law: Cases and Materials* (Brooklyn, 1950), pp. 454-461. Cf. also *Miller v. Tennis*, 282 Pac. 345, 350 (Okla., 1929) and cases cited in 33 *Col. L. Rev.* 524, n. 136 (1933).

Notes and Reviews

AN EXCHANGE OF MESSAGES ON THE OCCASION OF THE NINETIETH BIRTHDAY OF PROFESSOR SALVATORE RICCOBONO, FEBRUARY 5, 1954

Washington, D. C.
January 29, 1954
(Radiogram)

LT
SALVATORE RICCOBONO
5 VIA TAVOLACCI
ROMA

STUDIORUM DUCI NONAGENARIO SEMPER IUVENI VETERUM IURISPERITORUM AEMULO ATQUE AEQUALI SEMINARII WASHINGTONIENSIS MAGISTRO EPONYMO EIUSDEM SEMINARII CONCILIUM SOCIIQUE GRATULANTUR

KUTTNER, MAGISTER

Accademia Nazionale dei Lincei

Salvator Riccobono Kuttnero Magistro s.p.d.

Ante diem III Kal. Feb. gratulationes tuas sodaliumque Washingtonensis Seminarii romani iuris mihi gratissimas magna animi commotione iam nonagenarius accepi.

Ex toto corde, magister carissime, gratias tibi ago atque vehementer te rogo, ut sociis omnibus significes me fidelissimum animum gratissimumque, dum vivam, habiturum magnam illam vestram erga me benevolentiam immeritam semper recolentem.

Romae, nonis Februariis a. MDCCCCLIV.

ADDITIONAL NOTES ON THE ROMAN LAW IN GRATIAN

In last year's volume of this magazine, the critical problems connected with the texts of Roman law in the *Decretum Gratiani* were discussed by the present writer.[1] The article was designed to correlate and supplement with new observations the evidence which Guido Grandi ("Diomede Brava") in the eighteenth century and, recently, Professor Vetulani have assembled to show that the numerous excerpts from the legislation of Justinian found in Gratian's work were inserted only at a late stage of redaction. Meanwhile, Vetulani's conclusions have been corroborated by new findings made in the course of an inquiry into the manuscripts of Gratian preserved in France, an inquiry which is at present being conducted by a group of French scholars under the inspiring direction of Madame Jacqueline Rambaud-Buhot, of the manuscripts division of the Bibliothèque Nationale.[2] The new findings, first presented by Mme. Rambaud at the *Journées d'histoire du droit* in Paris, 6 June 1953, are now discussed in her paper, "Le 'Corpus Juris Civilis' dans le Décret de Gratien."[3] Since the two articles, hers and mine, were published without either writer's being aware of the other's parallel endeavors, the following notes are offered by way of a supplement.

1. In the thirty Gratian manuscripts of the Bibliothèque Nationale and in nine manuscripts of other Parisian and provincial libraries which were examined by Mme. Rambaud and her associates, omissions, interpolations, uncertainties of position, and other transcriptional disturbances of one or another Roman law text have come to light.[4] Even more revealing, however, are two of the earliest *Abbreviationes decretorum*, one being the anonymous MS *nouv. acq. lat.* 1761 of the Bibliothèque Nationale, which heretofore was gen-

[1] S. Kuttner, "New Studies on the Roman Law in Gratian's Decretum," *Seminar* 11 (1953) 12-50, hereafter cited as K.

[2] Cf. the articles cited in K. p.16 n.16.

[3] J. Rambaud-Buhot, "Le 'Corpus Juris Civilis' dans le Décret de Gratien d'après le manuscrit lat. nouv. acq. 1761 de la Bibliothèque Nationale," *Bibliothèque de l'École des chartes* 111 (1953 [1954]) 54-64, hereafter cited as R.

[4] R. pp.60-64.

erally considered a mere uncompleted copy of Gratian's work (it breaks off with C.12 q.2 c.39 [5]), but which Mme. Rambaud has established as a peculiar abridgment written in northern Italy *c.* 1160-1170; [6] the second is known as the work of Master Omnebene (Omnibonus), *c.* 1156, and in many respects amounts to more than a straight *abbreviatio*, in that its author frequently replaces Gratian's *dicta* (*paragraphi*) by summaries and expositions of his own.[7] Omnebene's epitome had a respectable manuscript tradition; [8] its literary relations to other works of the early decretists deserve a fresh examination.[9]

2. As for the *Abbreviatio* of MS *nouv. acq. lat.* 1761 (= *Pa*), Mme. Rambaud, after describing its characteristic traits in general, states that the manuscript does not contain any of the canons and

[5] Kuttner, *Repertorium der Kanonistik* (Città del Vaticano 1937) 108.

[6] R. pp.54-9.

[7] R. pp.54-5, 60. In another, forthcoming paper, Mme. Rambaud will present the evidence for the proposed reassessment of Omnebene's work as a combination of *summa* and *abbreviatio*.

[8] Seven MSS listed in *Repertorium* 259 (of which only Bibl. Nat. MS lat. 3886 was accessible to Mme. Rambaud); add the Vatican MS Reg. lat. 1039, which Maassen (*Geschichte der Quellen* [Graz 1870] 807) believed to be a copy of Cresconius' *Concordia canonum*, while Patetta considered it a MS of Gratian (*R. Accademia nazionale dei Lincei, Rendiconti*[6] 13 [1937] 432-3).— The statement that the Bodleian MS Tanner 8 of Omnebene presents in part I a different *Abbreviatio* (so *Repert.* 259, following Le Bras, who first recorded the MS) has upon re-examination proved to be mistaken. (But the initium, "Humanum genus" *rell.*, which is the only argument adduced for Omnebene by A. Teetaert, "Commentationes historiae iuris canonici," *Collectanea Franciscana* 14 (1944) 243, remains inconclusive, since it merely reproduces Gratian's opening sentence.)

[9] Such relations can be established, e.g., with the *Abbreviatio Lex alia* (cf. *Traditio* 7 [1949/51] 294 n.13) and the *Summa Sicut uetus testamentum* of Florence, Bibl. Naz. MS *Conv. soppr.* G.IV.1736 (*Trad.* 1 [1943] 279 n.1; a fragment also in Madrid, Bibl. Nac. MS 87, cf. G. Fransen, in *Revue d'histoire ecclésiastique* 48 [1953] 230). One of the common characteristics of these is the application of St. Jerome's trichotomic division of the Old Testament (*lex—prophetae—hagiographi*) to the concept of *lex divina* (Omnebene, D.1 p.c.1; for *Abbr. Lex alia* cf. *Repert.* 262) and its extension by analogy to the New Law (*euangelium—epistule—expositiones et canonice sanctiones* in Omnebene; *iiii*^{or} *euangelia—dicta apostolorum—expositiones . . . et institutiones sanctorum patrum* in *Summa Sicut uetus test.*), which in turn is based on Hugh of St. Victor, *De scripturis et scriptoribus sacris*, cf. Migne, PL 175.15.

dicta which in the standard text of Gratian quote or cite passages directly from the Digest, the Code, and the *Authenticae*.[10] However, with regard to the dicta the evidence offered is not quite conclusive. R. p.58 n.5 lists the following as absent from *Pa:* C.1 q.4 p.c.9, p.c.12 (= Nos. 5-6 of our list, K. p.19); C.2 q.3 p.c.8 (No. 9), q.6 p.c.39 (No. 14), p.c.40 (introduction to No. 15), p.c.41 (No. 15), q.8 p.c.5 (No. 17); C.3 q.3 p.c.4 (No. 18), q.6 p.c.2 (on this Romanizing dictum see below, section 4), q.9 p.c.15 (No. 21), q.11 p.c.3 (No. 24); C.4 q.2 & 3 p.c.2 (No. 25), q.4 p.c.2 (No. 26); C.6 q.1 p.c.21, p.c.22, p.c.23 (No. 30 with the introductory and concluding statements); and C.11 q.1 p.c.9 (No. 33: R. p.59, not in p.58 n.5). But the dicta C.3 q.7 p.c.1, q.9 p.c.18; C.5 q.1 p.c.3, q.3 p.c.1, q.6 p.c.3 (Nos. 19, 22, 27-29) are not accounted for; this would seem to imply that *Pa* does, after all, reproduce 5 of the 33 Roman law passages usually contained in that portion of Gratian's text (pr.-C.12 q.2 c.39) which is covered in this manuscript.

However this may be, *Pa* strengthens the case for distinguishing stages of revision in the Decretum. An argument to the contrary, viz. that nothing can be proved by an *abbreviatio* because the epitomator might merely have suppressed the Roman texts he found in his complete model, is not valid. For, *Pa* preserves nearly all the fragments of Roman law which Gratian took over from intermediary canonical collections, especially from Ivo of Chartres.[11] Hence, no intentional elimination of Romanistic material as such, no anti-civilian bias can be assumed as an explanation for the shape of the manuscript: the case parallels exactly that of the lost codex of Brava.[12]

3. The evidence from Omnebene (= *O*) points in the same direction, although the fact that a greater number of texts from the

[10] The mention of Justinian's Institutes (R. p.58) is a slip of the pen, as the Decretum does not use this part of the *Corpus iuris*.

[11] R. pp.57-8: only C.11 q.1 cc.5 and 36 are omitted. From Mme. Rambaud's list of the second-hand Roman law texts, the reference to C.11 q.1 c.1 "Gaius" (R. p.57 n.6) should, however, be stricken: Gratian here quotes not the Roman jurist but Pope Gaius of the Pseudo-Isidorian letter JK †157 (ed. Hinschius p.214). The reference to cc.21-28 of C.2 q.6 (R. p.57 n.5) should read cc.22-27.

[12] K. p.25.

Corpus iuris is included in his work presupposes a more advanced stage of redaction in the model he abbreviated. Mme. Rambaud, who has published the data from *O* only for the part which corresponds to *Pa*, found that about one half of the texts absent from the latter do appear in *O*. Her tabulation,[13] when expressed in terms of our list, shows the presence of Nos. 5-7, 12-14, 15 (with the preceding dictum C.2 q.6 p.c.40, but dict. p.c.41 is considerably shortened), 17-18, C.3 q.6 p.c.2, Nos. 21, 23-24, 25 (shortened), 31. If we add the 5 passages not recorded as missing in *Pa* (Nos. 19, 22, 27-29), this amounts to 19 out of the 33 texts in question up to this point (C.12 q.2 c.39), plus C.3 q.6 p.c.2. The list differs from the one that can be established for Brava's lost manuscript (K. p.24: Nos. 2, 3, 11-14, 16, 20-21, 23, 33 . . .), which includes only 11 numbers for this part of Gratian, the only common passages being Nos. 12-14, 21, 23, and the dictum just mentioned.

4. This dictum, C.3 q.6 p.c.2, belongs to the noteworthy class of statements in Gratian's work which show some proficiency in Roman law without expressly quoting from the sources. A few typical specimens were analyzed in last year's article;[14] like some of these,[15] the present dictum leaves the impression of an amateur's insecure grasp of the technicalities involved in his source materials:

> Exceptio fori dilatoria est atque ideo in initio litis debet opponi et probari. Peremptorias autem exceptiones (ut sunt prescriptiones longi temporis) sufficit in initio litis contestari.

The little distinction is based, as the glossators were quick to notice, on CJ. 8.35.8 ("Praescriptionem peremptoriam, quam ante contestari sufficit . . ."), *ibid.* 13 ("Praescriptionem fori in principio a litigatoribus opponendas esse legum decrevit auctoritas"), and 4.19.19 ("Exceptionem dilatoriam opponi quidem initio, probari vero postquam actor monstraverit quod adseverat oportet").[16] But

[13] R. p.60 nn.1-3.

[14] K. pp.42-7.

[15] Cf. K. p.43 for D.34 p.c.3; pp.45-7 for C.15 q.3 pr. and p.c.4.

[16] Cf. *Glossa ord.* v. *exceptio;* also (on the parallel passage, C.3 q.3 p.c.4 § 7) the marginal note of the *Correctores Romani,* Boehmer's note *o,* and Vetulani, "Gratien et le droit romain," *Revue historique de droit français et étranger* 4 24-25 (1946-47) 20.

the assertion that the *exceptio fori* has to be pleaded *and proved* at the outset of the suit *because* it is a dilatory exception is founded on a premise which the sources won't bear out; it was left, however, to later canonists to rectify Gratian's notions concerning dilatory exceptions by more precise subdistinctions.[17]

In some manuscripts, the texts from Justinian's Code are themselves found interpolated at this place;[18] moreover, Gratian's dictum appears for a second time in many manuscripts, at a not very distant place within the same *Causa*, i.e. at the end of C.3 q.3 p.c.4 (§7), where it follows upon a series of Roman law texts on judicial adjournments.[19] This duplicate is generally considered a *palea*,[20] but its presence in some of the oldest manuscripts may argue for an original duplication, which was eliminated as "chaff" by the schools at an early date.[21] To all these signs of instability of the textual tradition we have now to add the evidence of *Pa*, where the dictum is also absent from its "authentic" place, q.6 p.c.2.

5. A number of observations made in last year's article with regard to the textual tradition of the Roman law passages Nos. 1-33 can now be supplemented by Mme. Rambaud's findings in other

[17] *Exceptio declinatoria iudicii—dilatoria solutionis:* e.g., Ricardus Anglicus, *Ordo iudiciarius* 28 (ed. Wahrmund, *Quellen* II 3 [Innsbruck 1915] 89); *Glossa Palatina* C.3 q.3 *fin.* (Vatican MS Pal. lat. 658, fol. 35rb); *Glossa ord. loc. cit.* Cf. also the Accursian gloss on CJ. 4.19.19 v. *exceptionem.*

[18] Boehmer nn.22, 23 on C.3 q.6 p.c.2.

[19] The last of the excerpts preceding C.3 q.3 p.c.4 § 7 is the *Auth. Quod fieri* of CJ. 3.11.2 (*ex* Nov. 53.1): evidently the cause of the mistaken identification by Mme. Rambaud of C.3 q.6 p.c.2 with Nov. 53.1 (R. p.62).

[20] *Summa Parisiensis ad loc.* (ed. McLaughlin p.119); *Corr. Romani* note β; Boehmer n.52; Friedberg n.70 (= *palea* No. 86); M. Boulet-Sautel, "Les 'Paleae' empruntées au Droit romain . . ." *Studia Gratiana* I (Bologna 1953) 154, 157.

[21] Cf. K. p.14; W. Ullmann, "The Paleae in the Cambridge Manuscripts of the Decretum," *Studia Gratiana* I 168ff., esp. 172-4 (who overlooks, however, the pun implied in the double meaning of the sobriquets *palea* and *granum*—the allusion to Paucapalea and Gratianus being twisted into "chaff" and "grain"—when he tries to revive the humanists' pseudo-etymology, *palea* < πάλιν).—Huguccio had nothing to say about C.3 q.3 p.c.4 §7, cf. F. Gillmann, in *Archiv für katholisches Kirchenrecht* 88 (1908) 475, but the *Glossa Palatina* commented on exceptions in this place (cf. n.17 *supra*) and not in q.6 p.c.2.

manuscripts of Gratian.[22] The following survey is given, in general, without further reference to the omission of such passages in *Pa* and *O*.[23]

(4) C.1 q.1 cc.126-130, enlarged in some MSS by CJ. 9.27.2, 3 (K. p.35): several such MSS listed, R. p.62-3.

(5) C.1 q.4 p.c.9, missing in some MSS, designated as *palea* in others, variations of position (K. p.30): several MSS listed, R. pp. 60 n.4 (omissions), 61 (transposed, also in *O*), 64 (*palea* in one MS).

(7) C.1 q.7 c. 26, followed sometimes by CJ. 1.3.30 according to *Summa Parisiensis* (K. p.35): cf. R. p.62-3 (several MSS) and L. Guizard, in *L'Année canonique* 2 (1953) 87 (Ste.-Geneviève MS 342).

*(9) C.2 q.3 p.c.8, a *summula* on the delicts of accusers (*calumnia, tergiversatio, praevaricatio*), absent from Haenel's codex[24] (Friedberg's F; cf. his n.87 *ad loc.*) and *Br* (Brava § 36): also from *Pa* and *O*, R. pp.58 n.5, 60.

(11, 12, 13) C.2 q.6 cc. 29-31, provided in some MSS with inscriptions citing the Roman jurists by name and book (K. p.32): several MSS listed, for cc. 30-31 only, R. p.62-3.—Paul Dig. 49.5.3 inserted in c.30 (K. p.31 n.64): other MSS listed, R. p.62-3, for c.31 (? this would seem to be out of place, since c.31 is made up from Dig. 49.6 and 7, but c.30 from Dig. 49.5).—*In c.29 § 3 from Ulp. Dig. 49.4.1.7, the passage here bracketed,

[22] Nothing new is added, however, by her observations on C.3 q.8 c.1 §2 (R. p.63: intrusion of a fragment from CJ. 7.45.14—this is merely No. 20 of the usual Roman texts, K. p.34) and C.3 q.11 c.4 (R. *ibid.*: inscription "Codicis libro VIII tit. I" added—merely a verbal variant of the usual inscription of No. 24).

[23] To repeat the evidence of these two and that of Brava's codex (= *Br*, cf. K. pp.24-6): *Pa* omits Nos. 1-18, 20-21, 23-26, 30-33; *O* om. Nos. 1-4, 8-11, 16, 20, 26, 30, 32-33; *Br* om. Nos. 1, 4-10, 15, 17-19, 22, 24-32. Thus, 8 omissions are common to *BrPaO*, 9 to *BrPa*, 6 to *PaO*, while 5 each are peculiar to *Br* and to *Pa*.—In the following survey, passages not expressly discussed in K. are marked by an asterisk.

[24] This is now Leipzig, University MS Haen. 17. Haenel's own description, "Ueber eine ihm gehörige Handschrift des Decretum Gratiani," *Berichte über die Verhandlungen der kgl. sächsischen Gesellschaft der Wissenschaften* 29 (1877) 104-10, is still valuable, since Friedberg collated the MS only in part and had an unjustly low opinion of it (cf. his *prolegomena*, col. xii and xcvi-vii). In the light of recent discoveries concerning the instability of Gratian's *tractatus de poenitentia* in certain MSS (cf. K. p.16 n.16), it is of especial interest that the original scribe of cod. Haen. refrained from copying it, with the remark at the end of C.33 q.2: "Hic quidam interponunt penitentie tractatum, quem tamen iudicio rationis nos preterimus" (Haenel p.107, cf. Friedberg *loc. cit.*), whereas the canons *De poen.* D.1 cc.22-30, D.5 cc.2-7 and c.8 form part of an appendix he put at the end of C.11 q.3 (cf. Haenel p.106).

"[Dies autem istos . . . erit. Quare] si forte . . . ," which appears in the older editions, is a later insertion (cf. Boehmer, nn.65, 67 *ad loc.;* Friedberg n.298 *ad loc.*): addition found in Bibl. Nat. MS 3893, listed as *palea* in Douai MS 585, R. pp.63, 64.

*(15) C.2 q.6 c.41-dict. p.c.41, omitted in *Br* together with Gratian's preceding dictum (p.c.40, cf. Brava § 41): the same in *Pa,* R. p.58 n.5.

(16) C.2 q.8 c.2, only as marginal addition in some of the oldest MSS (K. p.34): absent from other MSS, marked as *palea* in St.-Omer MS 433, R. pp.60 n.4, 64.

(21) C.3 q.9 p.c.15, present in *Br* (K. p.25), but not in *Pa* and in Mazarine MS 1287, R. pp.58 n.5, 60 n.4.

*(23) C.3. q.11 c.2, only as marginal addition in Haenel's codex (Friedberg n.9 *ad. loc.;* Vetulani p.21): absent from *Pa* and Mazarine MS 1287, R. *ibid.*

(25) C.4 q.2 & 3 p.c.2-c.3, shows formal inconsistency with dict. pr. and dict. p.c.3 (K. p.48): considerably shortened in *O,* R. p.60.

(28) C.5 q.3 p.c.1 (*al.* c.1 *fin.*), shows formal inconsistency (K. p.47 n.120), position varies in Vetulani's Cracow MS (*Apoll.* 1948 p.133): also in Bibl. Nat. MS 16899, R. p.61.

(30) C.6 q.1 cc.22-23, omitted in *Br* together with the preceding dictum (p.c.21 § 1, K. p.37): the same in *Pa,* where also the concluding dictum is absent, R. p.58 n.5.—In dict. p.c.22, one MS replaces Gratian's reference to CJ. 1.3.30 by quoting the fragment itself ("Quisquis igitur sanctam . . . ," K. p.38): the same in *O,* R. p. 61 ("Quisquam [?] hanc sanctam . . .").

(31) C.6 q.4 c.7 *fin.,* absent from some MSS, of uncertain position in others, sometimes marked as *palea* (K. p.35): several MSS listed, R. pp.60 n.4 (om.), 61 (transp., also in *O*), 64 (*palea* in one MS).

(32) C.10 q.2 cc.1-3, of uncertain position (K. pp.38-9): shortened in several MSS, inscription from Nov. 120 (the source of many of the *Authenticae* here assembled) added in Bibl. Nat. MS 16898, R. pp.60 n.4, 63.

(33) C.11 q.1 p.c.9, inconsistency of inscription (K. p.26 n.51): text absent from *Pa, O,* and Bibl. Nat. MS 3884, R. p.59.

Today one cannot doubt any more that the Roman law texts in Gratian were the outcome of a complex process of revising and adding. It is another question whether we have to do with stages of original, multiple recension or, as Mme. Rambaud is inclined to believe,[25] with later accretions due to the activities of the earliest glossators. Our materials at present do not suffice to resolve this question; it remains to be seen whether a secure answer will be possible in times to come.

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[25] R. p.64.

Leopold Wenger, *Die Quellen des römischen Rechts* (Österreichische Akademie der Wissenschaften, Denkschriften der Gesamtakademie, Band 2). Wien, Adolf Holzhausens Nfg., 1953. xviii, 973 pp. $46.00 (cloth).

I

It is not given to many to bring to completion a project which dates back more than fifty years to the beginning of a professional career. Professor Leopold Wenger, in the calm of retirement at his ancestral home in Carinthia after a succession of teaching posts at Graz, Heidelberg, Munich and Vienna, saw the publication in the late spring of 1953 of a work to which he had devoted the greatest portion of his efforts during the whole of his scholarly life. It was only a few months later that he died. He did not live to see the laudatory reviews which have appeared in the past year,[1] but he had been assured of the firm place that his *Quellen* had gained as a fundamental text in the study of the Roman law.

With the publication of *Rechtshistorische Papyrusstudien* in 1902, the young professor embarked upon a field of endeavor which would remain paramount throughout his career.[2] On the occasion of the International Historical Congress at London in 1913, Wenger presented to the scholarly world his conception of the scope of Roman legal history: a history of the sources of the law coupled with a history of the institutions of the public law and of the private law. The first World War brought a temporary halt to his research, but in the post-war years Wenger undertook the direction of a series of volumes on legal history in the Iwan Müller–Walter Otto series, *Handbuch der Altertumswissenschaften.* The director himself would contribute volumes on the history of the sources of the

[1] Among others, reviewed by Adolf Berger, in *Classical Philology,* 49 (1954), 259-61; by Max Kaser, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte,* Romanistische Abteilung, 71 (1954), 403-11; by Wolfgang Kunkel, in *Gnomon,* 26 (1954), 235-40; by Edwin Seidl, in *Studia et Documenta Historiae et Iuris,* 19 (1953), 362-71; by Artur Steinwenter, in *Anzeiger für die Altertumswissenschaft,* 1952, cols. 89-92; and, with regard to papyrological material, by Rafael Taubenschlag, in *Journal of Juristic Papyrology,* 7/8 (1953-54), 413-41.

[2] The course of Wenger's career is charmingly presented in an autobiographical sketch, in *Österreichische Geschichtswissenschaft der Gegenwart in Selbstdarstellungen,* ed. N. Grass, 1 (Innsbruck, 1950), 133-56; a memorial tribute, with a complete listing of Wenger's publications, by Edwin Seidl, is found in *Studia et Documenta Historiae et Iuris,* 19 (1953), 452-73.

Roman law, on the Roman public law, and on the Roman private law. At the outbreak of World War II the first of these volumes had been substantially completed, but the war prevented its appearance. From 1945 to 1947 Wenger attempted to incorporate into the work as much of the non-German research during the war period as came to his hands, but he himself recognized that there were gaps and frequently refers to future "Addenda" to the published volume. The gigantic enterprise was in press from 1947 to 1953 and there was opportunity for the insertion only of a few supplemental references in the annotations.

II

The volume opens with a general introduction (pp. 1-45), which may be considered the opening essay of Wenger's contemplated comprehensive treatment of Roman legal history. The first paragraphs stress the tie between legal dogma and legal history. The ascertainment of the legal rules which existed in the ancient world is not an easy task, and certainly one that cannot be undertaken without full recognition that the terminology employed and the concepts formulated are not necessarily identical with modern terminology and modern concepts. Each legal system has to be placed in its own setting; the existent law has to be balanced against the ideal legal system (natural law), the legal policy which strives to create a better system has to be considered, and the devices employed for the development of legal principles (law-finding) have to be evaluated. It appears that the Romans were artists in the last of these topics, law-finding, born jurists in the fullest sense of the term. They themselves had little use for the efforts of other peoples in the evolution of their legal systems. But this should not blind us to the value of comparative law in our treatment of Roman legal history. Comparable legal phenomena may be the result either of (1) borrowing, (2) common origin, or (3) independent parallel development. The possibility of each of the three must be considered. Behind comparative law lies the idea of a universal legal history, with the necessary interaction of law and economics and sociology within the span of history; a legal historian is a historian in a universal sense as well as a jurist.

Comparison of legal institutions is of value only when the comparison is made between comparable stages of legal development.

We must discover what is the significance of a legal concept at a given time. Of all legal systems of antiquity it is the Roman which affords us the fullest insight into legal thinking and legal practice. It is this fact which led Wenger to formulate the idea of ancient legal history many years ago. Ancient legal history does not mean the search for one universal "ancient law," or even the amalgam of various ancient legal systems in the Roman law. Ancient legal history signifies rather the basis of understanding of other ancient legal systems by the utilization of our fuller understanding of the Roman law. Before a judgment can be made as to the influence of one legal system upon another, there has to be relatively full comprehension of both. The aim of ancient legal history is to provide this understanding.

Wenger next devotes a few pages to the interrelation of Roman legal history to the evolution of the other aspects of Greco-Roman culture, and more particularly to the close tie between legal science and linguistics, with special reference to the connection of Roman law with the Greek language.

The concluding pages of the introduction portray the general plan which Wenger had in mind. Roman legal history was to be presented in two large segments. The first would be devoted to a study of the sources, the second would be devoted to a study of the legal institutions insofar as these are made known by the sources. The remainder of the volume under review is concerned with the first topic, the "sources of knowledge" (*Erkenntnisquellen*) of the law. Wenger did not live to write the second book. Another will have to deal with this so-called internal legal history, which Wenger considered severable into the two spheres of *ius publicum* and *ius privatum*. We meet sources of law again in the treatment of the *ius publicum*, specifically in the history of the organization of the state. But in this case the sources are "sources of origin" (*Entstehungsquellen*) of the law rather than "sources of knowledge" of the law. Another topic of significance in the treatment of the *ius publicum* is a consideration of the administrative services of the state. The history of the institutions of the private law is of particular significance in the development of national legal systems. For this study of the development of public and private legal institutions a synchronistic exposition should be utilized.

Throughout these introductory pages, and throughout the hundreds of pages which follow, the text is accompanied by exhaustive

annotations. The annotations include comprehensive bibliographies, critical evaluations of the ideas and theories offered in scores of monographs by scholars the world over, and pertinent illustrations of the statements made in the text. The annotations are easily twice the extent of the text.

The bulk of Wenger's volume is devoted to a study of the sources of the Roman law, and primarily to a study of the written legal sources (pp. 54-877). Wenger treats of these written sources under three major headings, namely, (1) the external form of the sources, (2) the content of the documents and literature preserved, and (3) the method of presentation and evaluation of the sources. The first pages outline the subject matter to be covered and afford reference to the basic works in palaeography, in diplomatics, and in papyrology, which are of value in any consideration of the legal sources. The collections of sources, the manuals, the leading periodicals and indices, to 1945, are recorded (pp. 51-53).

The first chapter, on the external form of written documents, is a completely new departure in a study of the sources of the Roman law. Wenger has undertaken to treat of all conceivable factors which may be tied up with the use of wood tablets, wall paintings, stone and metal inscriptions, wax tablets, papyri and parchment, clay, ivory, linen, paper. It would be difficult to discover any treatment of publication, archives, bilateral or unilateral agreements, *antigraphon* and *ison*, the nature of diplomata, outer and inner writings, papyrus rolls and codex, *commentarii*, palimpsests, and a host of other topics, receiving fuller exposition in any manual. Each new reading of Wenger's text together with the voluminous notes affords insight into materials that up to this time had been difficult to find. Herein, to this reviewer's mind, lies the great value of Wenger's *Quellen*. Other writers have interpreted the sources of the Roman law with respect to the substance of the legal system. This is also to be found in Wenger, but in what other manual on Roman legal history is there discussion of the intrinsic significance of the sources themselves?

A second portion of the first chapter is devoted to the development of the script, to the types of abbreviations employed—with a listing of those important for the legal scholar, pp. 114-18—, the nature of numerals, glosses, and scholia. The section on seal and signature (pp. 129-49) is a definitive treatment of a topic which

Wenger himself had earlier called to the attention of the legal historian.

The second chapter of this part turns to the means by which the sources have been transmitted. With respect to documents there is a survey of inscriptions, papyri—a valuable itemization of papyrus publications, pp. 162-71—, and ostraca. Of even greater value is the exhaustive treatment of the references to Roman law in the non-juristic literature of antiquity (pp. 174-327). One does not expect to find such a thorough discussion of the annalists and early historiographers, nor the meticulous attention to the legal matters in the pages of Tacitus, Josephus, or the Christian chroniclers. The antiquarians, the writers of pure literature, the rhetoricians and political theorists—concerning Cicero as rhetor, cf. pp. 241-51, and as political writer, pp. 269-78—, all are fully exploited. Particularly to be appreciated is the critical evaluation of legal references in early Christian writings, e.g., the trial of Jesus, the legal position of Paul, the patristic literature, as well as canon law collections, synodal acts, and the remnants in the oriental collections, e.g., the Coptic and Arabic papyri and the Syrian law books.

The second part of this second chapter is devoted to the specifically legal source materials. This portion necessarily is the most extensive part of the whole volume. It has been divided into seven topics, the first of which, topic A, is entitled "Early Period and Twelve Tables" (pp. 327-72). This subdivision actually opens with three sections on written and unwritten law, on the Roman tradition, and on the Roman calendar and chronology. Following these unusual and extremely valuable discussions are the more typical expositions of the sources of the period of the Kingdom, and of the Twelve Tables. These last two are fully adequate; the primary and secondary literature is completely canvassed. In these and similar topics the book of Wenger is on a par with the fundamental works on Roman legal history like those of Karlowa, Krüger, Kübler or De Francisci.[3] It is by reason of the additional subject-

[3] Otto Karlowa, *Römische Rechtsgeschichte*, vols. I, II.1 (Leipzig, 1885-1901); Paul Krüger, *Geschichte der Quellen und Litteratur des Römischen Rechts*, 2nd ed. (München-Leipzig, 1912); Bernhard Kübler, *Geschichte des Römischen Rechts* (Leipzig-Erlangen, 1925); Pietro De Francisci, *Storia del Diritto Romano*, 2nd ed., vols. I, II.1, III.1 (Milano, 1938-43).

matter that the *Quellen* possesses unique value and sets a precedent for the future.

Topic B is entitled "The Republican Period and Principate" (pp. 372-424). In this topic are to be found particulars respecting *leges, senatusconsulta, leges datae* and *leges dictae* which have been preserved. The final section is an unusually informative summation of magisterial decrees, so many of which have become available in papyrus documents.

The content of topic C, "The Imperial Legislation" (pp. 424-473), affords a good example of the broad and comprehensive treatment Wenger has given to the various types of legal sources. The section opens with an analysis of the distinct kinds of imperial enactments, the pages devoted to decrees and rescripts incorporating all of the significant literature on this controversial subject and adding several conclusions adduced by Wenger himself. A second part treats of the imperial archives and of the collections of constitutions made during the formative period. Then there is a brilliant study of the various devices by which constitutions were made known, entailing a full consideration of the problem of *propositio* vis-à-vis *insinuatio*. In questions of interpretation of this nature, Wenger shows himself a master of the papyrological material, a circumstance which gives to the *Quellen* a scope and significance broader than that of any other manual of Roman legal history. The section closes with the description of some sixty imperial constitutions preserved for posterity in documentary form, with bibliography and critical interpretation in each case.

Topic D is devoted to the writings of the Roman jurists, pp. 473-530. Extensive as this portion of the volume may be, some reviewers have maintained that in view of the significance of the jurists' contribution, Wenger has slighted the persons and the efforts of the men to whom we primarily owe the heritage of the Roman law. It may well be true that on an absolute standard the jurists and their work far outshadow any other "source" of the Roman law. Yet this reviewer fully subscribes to Wenger's apparent underemphasis of the juristic sources. In the first place, significant monographs by Schulz and Kunkel were published too recently for consideration by Wenger.[4] Secondly, it may be noted that in the

[4] Fritz Schulz, *History of Roman Legal Science* (Oxford, 1946); Wolfgang Kunkel, *Herkunft und soziale Stellung der Römischen Juristen* (Weimar, 1952).

existing standard manuals on Roman legal history the persons of the jurists, their writings and their activities occupy a major portion of these works. Finally, it may be suggested that the real value of the jurists lies in the consideration of their responses and writings as "sources of origin" of legal rules rather than as "sources of knowledge" of the law. As such, Wenger would have wanted to deal with Roman *Jurisprudenz* in the volume on internal legal history. In fact, we lack any major work which treats of the jurists from this point of view. No one has undertaken to analyze the expressed thoughts of the individual jurists to discover the course of development of legal institutions during the period of the late Republic and the Principate. We have excellent biographies of the jurists and analyses of their writings from the point of view of style and citation of authorities; we have been informed of the significance of their places of origin and of their social positions. But we still lack a comprehensive critical treatment of their ideas.

The fifth topic in the sequence, "The Period of the Dominate" (pp. 530-61), deals with the relation of *ius* and *leges*, with the codification movement, and with the law books that have been preserved. It lacks, it is true, any extensive consideration of a subject which recent efforts of Professor Levy have brought to the fore, namely, the "vulgar law."[5] It fails, also, to discuss the alleged anonymous revisionists of the early fourth century. The half dozen scholars of Roman law who, during the last decade, have attributed an increasing number of the fundamental works of the classical jurists—at least in the form in which these works were utilized by Justinian's codification commission—to unknown editors of the first decades of the fourth century, have necessitated a reexamination of the value of the study of the Roman law. If the masterful legal thinking that is characteristic of the juristic writings in the Digest is actually due to compilers so humble that they dared not assert authorship, to men living in a regimented semi-oriental state, then Roman law ceases to be the product of enlightened democratic thought. Just as the pragmatic value of Roman law largely ceased with the enactment of modern codes, so also its jurisprudential significance will be discounted in the future. The reviewer, for one, is far from convinced that anonymous

[5] Ernst Levy, *West Roman Vulgar Law: The Law of Property* (Philadelphia, 1951), with further works cited in the Preface, p. vii.

revisionists seriously altered the substance of the ideas of the classical jurists.

With the topic of "The Codification Activity of Emperor Justinian" (pp. 562-734), Wenger returns to the superlative exposition which characterizes so much of this outstanding work. A section on Justinian and Theodora is a worth-while novel subject. In the step-by-step story of the codification the reader will find full discussion of the hypotheses which have been advanced to explain the particulars of that epoch-making adventure. Legal education during all periods is taken up at this point, pp. 611-37, in a fascinating survey. The topic closes with the description of the survival of the Roman law in the Byzantine empire and a short survey of its course in the west. It is unfortunate that Wenger was unable to incorporate the results of a number of recent studies, many from the hand of Professor Adolf Berger, which considerably alter the views held respecting the development of Roman law in Byzantine times. The older views, largely flowing from the works of early scholars like Heimbach and Zachariae, have been reproduced in all the manuals, including the *Quellen*. Similarly, the account of Roman law in the west could not take into consideration the very recent works of a flourishing school of Italian scholars.[6]

The final topic in this part is devoted to an analysis of the extant legal documents of private nature. In contrast with the dozen pages allotted to this subject in the most extensive treatment in a manual to date, the *Quellen* has over one hundred pages of large format, pp. 734-841. These pages are replete with details and constitute one of the most valuable portions of the whole volume. Professor Wenger has brought his life-long interest and study in papyrology to bear upon an aspect of Roman law that has been sadly neglected. The reviewer has called this aspect law-in-action revealed by the documents in which, as Wenger says, "citizens or subjects enter into private legal transactions with one another or direct written explanations of infinite variety to public or private addressees" (p. 734). Even though there can be only a selection from among hundreds of instruments, Wenger has finally undertaken to integrate the papyri of Roman and Byzantine Egypt into the frame of Roman law. The failure of most Romanists to consider Egyptian

[6] E.g., Francesco Calasso, *Medio Evo del Diritto*, I: *Le Fonti* (Milano, 1954), with further bibliography, pp. 633-41.

(and provincial) practice in a study of the Roman law has been deplorable.[7] In the *Quellen* there is an excellent introduction to papyrological materials in addition to the usual analysis of documents on wax tablets. The topic opens with a study of the scope and form of documents in general (pp. 735-55) and follows with the discussion of selected instruments in the spheres of the law of property, obligations, persons and family, succession, criminal law and procedure, civil process and oath.

The third chapter of the portion of the volume devoted to written sources is entitled "Presentation and Evaluation of the Sources" (pp. 841-77). There is an explanation of the various connotations of *interpretatio*, the interpretation or construction of instruments. And there is discussion of Justinian and pre-Justinian interpolation. This section of the *Quellen* has been criticized by those who believe that Wenger underestimated the importance of "interpolation-criticism" in the study of the juristic writings of the classical period. This reviewer notes that Wenger is not the only "conservative" in that respect.

The final part of the *Quellen* deals with non-written legal sources (pp. 878-911) and discusses the relation of archaeology, topography, and numismatics to the study of Roman legal history. These sections, like so many others, make readily available to the legal scholar the works of students of other fields of interest in classical antiquity.

A subject index and index of sources was prepared by Professor Seidl, a former student of Professor Wenger, with the help of two assistants. The preparation of indices for a volume of this size and one in which the author covers the gamut of research in Roman antiquity is a major task. There are omissions and there are misprints but this reviewer has the highest words of praise for a difficult and tedious undertaking well executed. No matter how exhaustive the indices to the *Quellen* might have been, only reading and rereading will unfold the abundant treasures of this book.

III

Not even the work of a master, one upon which years have been spent in preparation and in writing, will satisfy all who turn to it in

[7] A conspicuous exception was Ludwig Mitteis, whose incomplete *Römisches Privatrecht bis auf die Zeit Diokletians* (Leipzig, 1908), made ample use of the papyri published to that time.

every respect. Professor Wenger's *Quellen* will be no exception. Some will think there has been an overemphasis of the role of ancient legal history. To others the space devoted to the biographies of the jurists and the analysis of their writings is insufficient. There may be some subject which, in the opinion of one or the other reader of the volume, has been neglected. One such minor matter may be called to attention.

No mention is made in the *Quellen* of a source which, until a century ago, was regularly included in all collections of source materials of the Roman law. This is the *Sententiae et Epistulae divi Hadriani*, which along with other bilingual texts has been preserved in a number of manuscripts; one of the others, the so-called *Fragmentum Dositheanum*, is still included in collections and is discussed by Wenger. A century ago Dirksen dismissed the fragment of *Sententiae et Epistulae* as an exercise fabricated to demonstrate the piety of Hadrian.[8] Without further critical study the *Sententiae et Epistulae* has been excluded from all collections since that time. Many years ago the reviewer undertook to examine the credibility and the value of the source. He is convinced that *Sententiae et Epistulae* deserves recognition as a reliable account of opinions rendered by or on behalf of the emperor; final judgment must await the publication of his researches. Wenger, however, might have noted the existence of this source and described its eclipse.

The greatest deficiency in the *Quellen* undoubtedly stems from the fact that much of the research in Roman legal history since the beginning of the war, and all since 1947, has not been incorporated into the discussion. This reviewer warmly seconds the proposal advanced by Professor Berger.[9] Wenger, himself, stated that he intended to prepare a volume of "Addenda" (*Nachträge*) and undoubtedly had prepared notes for that purpose. Berger says, "It would be the most effective and the most dignified kind of honor to the memory of the unforgettable scholar and teacher, if his pupils and closer friends would take care of the publication of these loose notes . . . and complete them in conformity with his way of presentation, with additions (at least until 1953) . . ."

[8] H. E. Dirksen, in *Denkschriften . . . Akademie der Wissenschaften*, Berlin, 1857, republished in Dirksen, *Hinterlassene Schriften*, ed. F. D. Sanio, II (Leipzig, 1871), 392 ff.

[9] *Loc. cit. supra*, note 1.

The volume, which marks the culmination of a life-time of scholarly work, must not be considered the sole contribution of a great student of the Roman law. Lest the reader be misled it should be categorically stated that Professor Wenger's publications in the areas of substantive private law, in public law, in methodology and in legal philosophy rank among the highest of the past decades. For example, Wenger's manual on Roman civil procedure became, on its publication in 1925, the accepted standard textbook on the subject. In 1940, an English translation of this book enabled students to discard the translation of Engelmann's Roman Procedure, a work which in fact had become antiquated in 1888 when Professor Wlassak demolished the existing theory of the nature of the Roman civil process. Professor Wenger's book and numerous articles in the field of Roman procedure alone would accord him a secure position among the scholars of this century in the field of Roman law. His research in Roman legal history, in the related fields of legal papyrology and epigraphy, and in the methodological approaches included within the term ancient legal history —all of which have culminated in the volume under review— assure him the gratitude of scholars in the decades to come. He has brought together the mass of learning in this broad field, he has added his penetrating observations, he has opened up untold avenues for future study. The *Quellen* of Professor Leopold Wenger is truly an *opus maximum*.

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Adolf Berger, *Encyclopedic Dictionary of Roman Law* (Transactions of the American Philosophical Society. New Series. Volume 43, Part 2, pp. 331-808). Philadelphia: 1953. 478 pp. Unbound $5.00, bound $7.00.

This work is described in the Preface as having been " designed for teachers and students of Roman law in the classroom, for students who have little or no Latin, and for readers of juristic or literary Latin texts in translations which are not always reliable when legal terms or problems are involved." The author, a scholar and teacher of long experience and of recognized competence, has

produced a tool which has been a great desideratum, and one which should do much not only to assist all those just mentioned, but also to stimulate a wider interest in the general understanding of Roman legal language and concepts.

On the lexicographical side, the new dictionary may be characterized as a glossary conceived on comprehensive lines. It is not a complete dictionary in the sense of Heumann-Seckel, but it does cover with reasonable completeness legal or quasi-legal terms that fall within the various divisions of private and public law and institutions, whether they occur in juristic or non-juristic sources. A number of medieval and modern terms employed in the field of Roman law are also included.

The encyclopedic approach in all significant entries is a most welcome feature of the new dictionary. It makes the work all the more indispensable for the non-specialist and, at the same time, a most convenient handbook of ready reference for the specialist as well. Along with the definition of a legal term, an office, or an institution, its history or historical importance is sketched very briefly but adequately. Each of the laws known by name from the Republican Period, *Lex Aebutia, Lex Aquilia,* etc., is given its own lemma and a brief historical characterization. There are articles on each of the great ancient jurists and legal collections, on the Christians and Jews and their legal status, etc. In the historical treatments special attention is given to all significant changes in legal terminology and concepts from early law down to and including the reforms of Justinian.

Definitions are given in succinct but clear language, and the historical data, while very brief at times, are adequate at least for purposes of first orientation and guidance, for each article contains references to the legal sources themselves or to the best modern scholarly treatments of points at issue. The author has adhered to the standard critical texts of the legal sources. He has not neglected the thorny problem of interpolations, but, as is proper in a dictionary of this kind, he has adopted a soundly conservative attitude. Throughout the dictionary, he has employed an excellent system of cross-reference, making effective use of typographical devices to aid the reader.

Following the text of the dictionary proper, there is an English-Latin Glossary (pp. 773-785) and an elaborate and invaluable

General Bibliography (pp. 786-808). The glossary mentioned should be a particularly welcome help to legal students with little or no Latin in locating treatments of Latin technical terms and of basic Latin legal concepts. The bibliography has been prepared with extraordinary care. It is divided into twenty parts, beginning with a section on textbooks and related works and ending with one on bibliographies of Roman Law. The attention of readers of this journal is called especially to the following sections: VIII, Christianity and Roman Law; IX, Roman Law and Modern Legal Systems (including Byzantine and Medieval law), and X, Roman Law and the Anglo-American World.

The book is of quarto size and is printed on excellent paper in large, clear type. Through the help of generous subsidies, the American Philosophical Society has been able to make this volume available at the unbelievably low price of $5.00, unbound, and of $7.00, bound in blue cloth.

A few criticisms are offered. While Roman private law seems to be covered systematically and consistently, a certain arbitrariness and uncertainty is revealed as regards public law and closely related fields. Thus, there are two brief special entries under *leges datae,* but no general reference to *lex data* under *dare* and *lex*; some official titles are included but others of equal importance are omitted, etc. But the greatest single weakness in this respect is in the field of Christianity. A considerable number of Christian terms are given, yet many others of equal significance are omitted. Thus, under *sacramentum,* there is no reference to the use of this word in legal sources, *mysterium* is not listed at all, *sacerdos* appears but not *diaconus* or *presbyter, concilium* is not cited in its Christian use, and *synodus* is omitted entirely. The *Circumcelliones, Donatistae,* and *Manichaei* are mentioned in the legal sources, but they are missing in the dictionary. For a copious list of such omissions, including some of those cited along with many others, see the detailed review of the present work by Professor P. R. Coleman-Norton in *American Journal of Philology* 26 (1955) 90-03. An occasional reference is made to Villien-Magnin, *Dictionnaire de droit canonique,* but this work is not listed among books frequently cited, and there is no reference whatever to Cabrol-Leclercq, *Dictionnaire d'archéologie chrétienne et de liturgie,* with its wealth of important articles on Christian institutions, the

relations of Christianity with the Roman State, etc. Finally, in the case of terms of major importance in private or public law, references might well have been made to the comprehensive coverage found in the *Thesaurus linguae latinae.*

Such shortcomings should not be passed over in silence, yet they should not affect unduly our general appreciation of the new dictionary. It is an invaluable tool which ought to be and, because of its wonderfully low price, can be on the shelf of every one concerned in any way with Roman history, institutions, or law.

MARTIN R. P. MCGUIRE

THE CATHOLIC UNIVERSITY OF AMERICA

Professor A. Arthur Schiller has contributed a masterful Legal Commentary to the edition of thirteen imperial rescripts from the Columbia Papyrus 123, which was recently published in the series of Columbia Bicentennial Editions and Studies: *Apokrimata: Decisions of Septimius Severus on Legal Matters,* Text, Translation, and Historical Analysis by William Linn Westermann; Legal Commentary by A. Arthur Schiller (New York: Columbia University Press, 1954. $5.00). The papyrus in question gives Schiller an excellent opportunity to discuss the general problems presented by the rescript procedure, as well as the numerous problems of substantive law dealt with or touched upon in the individual decisions—fines, real securities, undertaking of obligations by women on behalf of others, intestate succession, delicts of tax-farmers, guardianship, and many other points of interest. Each topic is seen in a broad context of legal history and legal dogmatics, and Professor Schiller's lucid, well documented discussion makes the valuable publication and annotation of P. Col. 123 by his late lamented colleague, the eminent papyrologist of Columbia University, still more valuable.

Investigation of the role of law and legal institutions in the framework of cultural and religious history has always been one of the chief concerns of Professor Eberhard F. Bruck. Ever since his researches on *Totenteil* and *Seelgerät* in ancient Greek law (1926) he has given us fascinating insights in the delicate workings of the interrelations between legal, spiritual, social, political, and cultural phenomena that can be traced in both Eastern and Western civilization. A number of papers he published during the last ten years in this country and in Italy have now been assembled, translated into his native German, under the title *Ueber römisches Recht im Rahmen der Kulturgeschichte* (Berlin-Göttingen-Heidelberg: Springer, 1954), giving a fine testimony of the inner coherence of Bruck's research and of his gift of lively, colorful presentation. Three of the seven essays united in the volume ap-

peared originally in SEMINAR, under the titles: "Cicero vs. the Scaevolas, re: Law of Inheritance and Decay of Roman Religion," 2 (1943) 1-20; "The Ghost Story of the 'Cheerful Giver' in Medieval and Modern Civil Law," 4 (1946) 45-47; "Political Ideology, Propaganda, and Public Law of the Romans: Ius imaginum and Consecratio imperatorum," 7 (1949) 1-25; a fourth combines a paper first published in *Scritti in onore di Contardo Ferrini* with "The Growth of Foundations in Roman Law and Civilization," SEMINAR 6 (1948) 1-19. The editors of this magazine take pride in having provided the first vehicle for publication of so substantial a portion of this volume of collected essays.

Likewise based in part on previous publications in SEMINAR is vol. 37 of the Memoirs of the American Philosophical Society: *Astrology in Roman Law and Politics*, by Frederick H. Cramer (Philadelphia, 1954. $5.00). Cf. "The Caesars and the Stars," *ante*, 9 (1951) 1-35; 10 (1952) 1-59. The author, who lost his life in an accident shortly before the appearance of the volume here announced, presents the legal problems previously treated now in the wider context of a general history of astrology in republican and imperial Rome.

Among the numerous studies published in recently founded series of monographs, attention is called to the following two, which were sent to the editors of this magazine: *Die Bereicherungshaftung im klassischen römischen Recht*, by Hubert Niederländer (Forschungen zum römischen Recht, ed. Kaser, Kreller, and Kunkel, vol. 6, Weimar: Böhlau, 1953), an inquiry into the complex problem of the existence and extent in classical Roman law of the remedies for unjust enrichment; and *Les actions civiles*, by André Magdelain (Publications de l'Institut de droit romain de l'Université de Paris, vol. 11; Paris: Sirey, 1954), a study of the no less intricate problem of the relation between actions at civil law and praetorian remedies before the systematization of the *ius honorarium* as a source of "law" was accomplished in the wake of Hadrian's reforms.

The editors of SEMINAR extend their warmest congratulations to Professor Adolf Berger, New York, on his election as member of the *Accademia Nazionale dei Lincei* in Rome. A well-deserved honor has been bestowed by his Italian colleagues upon the indefatigable scholar, among whose numerous publications we are proud to record the valuable contributions he has made to volumes 2, 3, 5, 7, 9, and 10 of this periodical. *Ad multos annos.*

THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

Academic Year 1953-1954

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Papers read at the Meetings of the Seminar:

January 4, 1954: Dr. Herbert F. Jolowicz, Regius Professor of Civil Law, Oxford: "The Stone that the Builders Rejected."

February 4, 1954: Dr. Max Rheinstein, Professor of Law, University of Chicago: "Jus Gentium as a Source of American Private International Law."

May 3, 1954: Dr. Daniel A. Binchy, Senior Professor, Institute for Advanced Studies, Dublin: "Celtic and Roman Law."

May 13, 1954: Dr. Stephan Kuttner: "A Century of Research in Medieval Roman and Canon Law."

Honorary Membership:

At the meeting of February 4, 1954, the *Concilium* conferred the Honorary Membership in the Riccobono Seminar of Roman Law in America upon Dr. Ernst Rabel, the eminent Romanist, on the occasion of his eightieth birthday.

Concilium elected for the Academic Year 1954-1955:

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Dr. William H. Roberts, *Scriba.*

Dr. Vernon X. Miller, Dean, School of Law, The Catholic University of America, *ex officio.*

Dr. A. Arthur Schiller.

Dr. Stephan Kuttner.